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Supreme Court of the United States

OCTOBER TERM, 1958

No. 157

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LEWIS M. STEVENS, SUCCESSOR TO JOSEPH LAW-  
LER AS SECRETARY OF HIGHWAYS OF THE  
COMMONWEALTH OF PENNSYLVANIA, ET AL.,  
APPELLANTS,

*vs.*

J. K. CREASY, WILLIAM W. McNAMEE,  
JACK C. MARSHALL, ET AL.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

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FILED JULY 7, 1958  
PROBABLE JURISDICTION NOTED OCTOBER 13, 1958

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA**

No. 13672 Civil Action

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated,

VS.

LEWIS M. STEVENS, Successor to JOSEPH LAWLER, as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania, and GEORGE M. LEADER, Governor of the  
Commonwealth of Pennsylvania,

**DOCKET ENTRIES**

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- Aug. 1 Complaint entered, affidavit attached.
- Aug. 1 Summons issued.
- Aug. 1 Motion filed and temporary restraining Order  
entered directing that the defendants be and  
hereby are enjoined from enforcing with refer-  
ence to highway until hearing on application for  
an interlocutory injunction. Marsh, J.
- Aug. 8 Order of Court received from John Biggs, Jr.,  
Chief Judge designating the Hon. Austin L.  
Staley, a Circuit Judge, and the Hon. John L.  
Miller, to sit with Rabe F. Marsh, Jr., Judges  
of the U. S. District Court for Western District  
of Pa. to hear and dispose of the above entitled  
case.
- Aug. 11 Praecipe for appearance of atty. Leonard Men-  
delson for defendant, filed.
- Aug. 12 Summons returned served.

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- Aug. 12 Summons returned served on 8/9/55 with copy of Motion and Temporary Restraining Order.
- Aug. 26 Answer of defendant filed.
- Aug. 26 Notice of Motion for Summary Judgment filed, acceptance of service thereon.
- Aug. 26 Defendants' Motion for Summary Judgment filed.
- Sept. 2 Order of Court entered permitting Amendment to Complaint be filed; Waiver of defendants; Amendment to Complaint filed; Defendant to answer within 20 days.
- Sept. 7 Answer to Amendment to Complaint filed. Acceptance of service thereon.
- Oct. 18 Request for admissions under Federal Rule 36 filed by plaintiff, acceptance of service of copy thereon.
- Oct. 26 Response to request for admissions under Federal Rule 36, filed, with acceptance of service thereon by attorneys for plaintiffs.
- Nov. 1 Order of Court entered directing consolidation for pre-trial hearing and trial of Civil Actions Nos. 13672 and 13841. Further Ordered that a pre-trial hearing is fixed for Friday Dec. 2, 1955 at 10:00 AM.
- Nov. 16 Motion to Amend for Summary Judgment, filed. Consented to by counsel Order of Court entered granting defendants' motion to amend Motion for Summary Judgment.
- Nov. 25 Affidavit of Leonard P. Kane offered by plaintiffs in opposition to motion for summary judgment, filed.
- Nov. 25 Affidavit of Samuel Rothman offered by plaintiffs in opposition to motion for summary judgment filed.
- Nov. 25 Affidavit of Maurice L. Kessler filed.

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- Nov. 25 Affidavit of Albert W. Tuicillo in opposition to motion for summary judgment filed.
- Nov. 25 Affidavit of J. K. Creasy in opposition to motion for Summary judgment filed.
- Nov. 29 Affidavit of J. Cal Callahan offered by plaintiffs in opposition to motion for summary judgment, filed.
- Dec. 2 Affidavit of Donald M. McNeil in support of Motion for Summary Judgment filed, acceptance of service of copy thereon. (filed 13672 CA)
- [fol. 2]
- Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by Plaintiffs Pawel and Mary Werbitsky.
- Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by Plaintiffs Edward K. and Marcella A. Nanz.
- Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by H. Mitchell, plaintiff.
- Dec. 2 Pre-trial hearing before Staley, Marsh & Miller, J's begun.
- Dec. 2 Pre-trial hearing concluded.
- Dec. 2 Trial memo filed. (The stipulations are to be filed within two weeks or on Dec. 16, 1955, also all exhibits and names of witnesses to be used in the case.)
- Dec. 2 Hearing on Motion by Defendant for Summary Judgment begun before Staley, Marsh & Miller J's.
- Dec. 2 Hearing on Motion by Defendant for Summary Judgment concluded.
- Dec. 2 Hearing memo filed. (Briefs will be filed by Dec. 16, 1955, and an appropriate order will be made.)



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- Dec. 9 Transcript of official notes of proceedings taken at the Pre-trial Conference and hearing on Motion for Summary Judgment held at Pgh., Pa., Friday, Dec. 2, 1955 before Staley, J., Marsh, J. and Miller, J., filed.
- Dec. 15 Order of Court entered extending time to December 20, 1955 for plaintiff's filing of supplemental briefs, Stipulation, etc.; Consented to by attorneys for defendants.
- Dec. 16 Statement in compliance with Court Instructions filed by plaintiffs; service of certified copy thereon.
- Dec. 16 Motion filed, Order of Court entered allowing defendants answer be amended as set forth in the within motion. Consent of plaintiffs thereon.
- Dec. 19 Stipulation counsel re Airport Parkway, etc., filed.
- Dec. 19 Agreement of counsel re defendant's Motion for Summary Judgment filed.
- Dec. 19 Memorandum to Court regarding witnesses, etc., filed.

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- Feb. 17 Transcript of Proceedings of Pretrial Conference Feb. 13, 1956 at Pgh., Pa. before Hon. Staley, Marsh & Miller, filed.
- Feb. 20 Order of Court entered dismissing Defendant's Motion for Summary Judgment, Exception noted to defendants. (Marsh, J.)
- Feb. 29 Order of Court entered directing the written agreement of plaintiffs and defendants docketed Dec. 19, 1955 is hereby nullified. (Copy of agreement attached) Miller, J.
- Feb. 29 Order of Court entered directing that all persons having a question of law and a question of fact in common with the plaintiffs in the above captioned action, shall intervene as named plain-

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tiff on or before March 22, 1956, or thereafter be barred from such intervention without good cause shown for failure to intervene on or before the said date. The Court shall proceed as to those plaintiffs named as of that date. (Miller, D.J.) Notice of order acknowledged by counsel for plaintiffs.

- Mar. 16 Motion to intervene filed Mr. & Mrs. Wm. E. Bell, et al.
- Mar. 16 Motion to intervene filed by Hugh J. Murdoch, et al.
- Mar. 16 Order entered permitting intervention of parties plaintiff, Hugh J. Murdoch, et al. & Mrs. Wm. E. Bell, et al.
- Mar. 16 Petition for leave of Florence Webb to intervene as party plaintiff, approved by the Court, and filed.
- Mar. 16 Petition for leave of Joseph Adams to intervene as party plaintiff, approved by the Court and filed.
- Mar. 19 Notice of petition for injunction, Acceptance of service, and petition for injunction, filed by counsel for the defendant.
- Mar. 19 Notice of Motion to require plaintiffs to furnish bond, acceptance of service, and Motion to require plaintiffs to furnish bond, filed by defendant.
- Mar. 21 Objections to Motion to require plaintiffs to furnish bond, filed by plaintiff.
- Mar. 21 Answer to Petition for Injunction, filed by plaintiffs.
- Mar. 21 Requests for Findings of fact, filed by plaintiffs.
- Mar. 21 Stipulation of counsel that all matters of record, etc. shall be considered part of the record, etc., filed.

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- Mar. 21 Stipulation of counsel as to relevancy of certain matters; filed.
- Mar. 22 Hearing before Staley, C.J., and Marsh and Miller, District Judges on Motion for interlocutory Injunction and for continuance of Restraining Order.
- Mar. 22 Hearing concluded; trial memo filed.
- [fol. 3]
- Mar. 22 Motion of Fisher Oil Company, to intervene, and Notice of said motion filed, and Order entered allowing Fisher Oil Company to intervene in the within case.
- Mar. 22 Complaint of Intervenor, Fisher Oil Company, filed.
- Mar. 27 Answer to Complaint of Fisher Oil Company, filed. Certificate of mailing copy attorneys for Fisher Oil Co., thereon.
- Mar. 28 Stipulation of counsel and affidavit of Arthur M. Barnes, Secretary of Fisher Oil Co., intervenor re Intervenor's Complaint will exceed sum of \$3,000.00, filed.
- Mar. 29 Stipulation of counsel for Commonwealth of Pennsylvania and Joseph Adams re damage to property filed.
- Mar. 29 Affidavit of value of property that abutts Airport Parkway, filed by Joseph Adams.
- Mar. 29 Stipulation of counsel for the Commonwealth of Pennsylvania and Florence Webb re damage to property, filed.
- Mar. 29 Affidavit of value of property that abutts Airport Parkway, filed by Florence Webb.
- Apr. 2 Affidavit of value of property filed by Charles Sodini, Anna J. Price, Charles William Price, Santa M. Scally, Joseph Scally.



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- Apr. 3 Acceptance of service of Notice for defendant, filed.
- Apr. 4 Transcript of Proceedings of hearing held Pgh., Pa., 3/22/56 before Judges Staley, Marsh & Miller, filed.
- Apr. 11 Defendants' request for Findings of Fact in connection with Plaintiffs' application for injunction, filed.
- Apr. 11 Defendants' request for Findings of Fact in connection with defendants' petition for injunction, filed.
- Apr. 12 Plaintiffs' supplemental requests for Findings of Fact and Conclusions of Law, filed. Acceptance of service thereon.
- Apr. 13 Stipulation of counsel re-amending zoning ordinance and defendants' request for Findings of Fact, filed.
- May 1 Order of Court by Staley, Circuit Judge, Rabe F. Marsh and John L. Miller, District Judges entered, directing (1) that all proceedings in this Court in these matters be stayed until a definite construction of the Act of May 29, 1945 P.L. 1108, as amended, by the State Courts be had; provided that the parties diligently pursue the remedies in the State Courts; (2) that the temporary restraining order heretofore entered on 8/1/55 in Civil Action No. 13672 be continued in force and effect until further Order of this Court; (3) that the request of the defendants for an injunction against J. K. Creasy and his wife and George J. Paulos and his wife and the request of the defendants that the palintiffs (sic) be required to file bond are hereby severally denied, without prejudice, however, to the defendants to renew their application in the State proceedings and without prejudice to seek such further relief in the State courts as they may deem fit and proper.



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Dec. 28 Petition to dissolve temporary restraining Order and to dismiss complaint filed by defendants.

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Jan. 2 Notice of defendant's Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint filed.

Jan. 7 Answer to petition to dissolve temporary restraining order and to dismiss Complaint, filed. Acceptance of service thereon.

Feb. 12 Hearing on Petition to dissolve Temporart (sic) Restraining Order and Dismiss Complaint before Judges, Miller, Marsh & Staley, begun.

Feb. 12 Hearing concluded C.A.V. Trial memorandum filed. (H. Thomas, Reporter)

Feb. 19 Order entered that the petition filed by the defendants to dissolve the Temporary Restraining Order and to dismiss the Complaint is hereby denied. Staley, C.J., Marsh, D.J., and Miller, D.J.

Apr. 5 Transcript of official notes of hearing held 2/12/57 before Honorable Staley, Circuit Judge, Marsh & Miller, District Judges, filed.

Aug. 13 Plaintiff's motion for Permanent Injunction and supporting affidavit filed Aug. 9, 1957, with acceptance of service thereon.

Aug. 13 Defendant's Petition to dissolve Temporary Restraining Order and to Dismiss Complaint filed Aug. 9, 1957, affidavit attached.

[fol. 4]

Aug. 19 Notice of defendants' petition to dissolve Temporary Restraining Order and to dismiss Complaint, filed.

Aug. 20 Answer to Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint filed Aug. 9, 1957, filed. Acceptance of service of copy thereon.

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Sept. 26 Stipulation of counsel in re Affidavits of Donald McNeil and Joseph Barnett, filed together with proposed Orddr (sic) of Court.

Sept. 30 On Stipulation filed Sept. 26, 1957, Order entered directing that the same be approved and filed, and the affidavits of Donald McNeil and Joseph Barnett, heretofore filed in support of defendant's Motion for Summary Judgment are hereby admitted to the record as depositions. Marsh, D.J.

Oct. 9 Amended Request for Findings of Fact and Conclusions of Law filed by counsel for plaintiff Oct. 8, 1957.

Oct. 9 Memorandum in support of defendants' petition to dissolve Temporary Restraining Order and to Dismiss Complaint filed Oct. 8, 1957 by counsel for defendants.

Oct. 14 Order entered Oct. 11, 1957 directing the caption and record herein be amended by adding as defendant, Lewis M. Stevens, Successor to Joseph Lawler, as Secretary of Highways of the Commonwealth of Pennsylvania. Marsh, D.J.

Nov. 18 Hearing on Arguments begun before Jusges (sic) Staley, Miller and Marsh.

Nov. 18 Hearing concluded C. A. V.

Nov. 18 Hearing memo filed. (Rep. Ruby Palmer)

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Mar. 19 Order entered directing that defendants Lewis M. Stevens, Sec'y. of Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of Pennsylvania are permanently enjoined from enforcing or otherwise complying with the Penna. "Limited Access Highways Act" 1945 May 29, P. L. 1108 Par. 1 et seq., as amended 36 Purdon's Pa. Stat. ann. Par. 2391.1 et seq. so as to interfere with

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or deprive the plaintiffs of their right of ingress or egress to, from or across the "Airport Parkway" in Allegheny County, Pa., Austin L. Staley, Circuit Judge, John L. Miller, District Judge.

May 12 Notice of Appeal to the Supreme Court of the United States filed by defendant.

May 12 Letters sent to counsel and to Judges.

July 3 Record on Appeal mailed to the Clerk of the Supreme Court of the United States at Washington, D. C., and letters mailed to counsel and Court.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 13672 (Equitable Relief)

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

v.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

COMPLAINT—Filed August 1, 1955

1. Plaintiffs herein are: J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuicillo, Ed Kleeman, R. G. Cummiskey. Plaintiffs are residents of said District and bring this action on behalf of themselves and other property owners and tenants of real property abutting The Airport Parkway as further defined herein. There are 50 or more other persons who are property owners or tenants on

property which abutts the said Airport Parkway. For the purpose of this action, the five miles of public highway extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport is termed the "Airport Parkway." The question to be determined herein is one of common and general interest to each of them, for which reason Plaintiffs herein sue for all such persons in like situation with themselves, pursuant to Rule 23 a of the Federal Rules of Civil Procedure. The said Airport Parkway has been in operation for about five years. At the present time, it is the principal thoroughfare for travel between the City of [fol. 6] Pittsburgh and the Greater Pittsburgh Airport, and many thousands of vehicles use it every day, and thus pass the respective properties of the Plaintiffs herein, which properties as aforesaid abutt said highway, so that for many purposes, the location of land immediately abutting on it presents an element of very considerable value. Some of the Plaintiffs have filling stations or other business establishments, in the operation of which immediate access to the highway is a valuable element; others of the Plaintiffs contemplate (sic) improvements or (sic) like or other kinds on their respective properties, and with reference to which the immediate proximity of the highway would be of great value and importance.

2. (a) The Defendant, George M. Leader, is the Governor of the Commonwealth of Pennsylvania.

(b) The Defendant, Joseph Lawler, is Secretary of Highways of the Commonwealth of Pennsylvania. As such, he is in charge of supervision and maintenance of the highways of the Commonwealth of Pennsylvania.

(c) The County of Allegheny is a municipal sub-division of the Commonwealth of Pennsylvania.

(d) This court has jurisdiction of this action for the reason that it arises under the Constitution of the United States and particularly under Article 1, Section 10 of the Constitution, and the 14th amendment. This action involves more than the sum of \$3,000.00, exclusive of interest and costs.



[fol. 7] 3. At the time of the building of the said highway by the County of Allegheny, for the purposes of the highway, the county of Allegheny condemned by eminent domain the necessary quantities of land including, in some instances, land taken from the aforesaid properties of some of the Plaintiffs herein. In making allowance for the damages to which the said persons would be entitled, by reason of said taking, it was the contention of the County of Allegheny—and in accordance with standard practice in Pennsylvania—that the damages should be diminished to the extent of the benefits which the property owner would obtain by reason of having frontage on a new highway, and direct ingress and egress thereto and therefrom. Therefore, all or a great part of the land necessary for the building of said highway was purchased, or seised, and paid for on the basis of future benefits by reason of said abutting on said highway, and said ingress and egress.

4. By statute of 1945, amended in 1947 (36 P. S. 2391), the Commonwealth of Pennsylvania has undertaken to permit what is known as Limited Access Highways. Said statute provides, inter alia, as follows:

“(a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, [fol. 8] take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway.”

The said statute further provides as follows:

“The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of

any political sub-division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

Pursuant to the provisions of the said statute, which on its face attempts to authorize the Secretary of Highways to do so, with the approval of the Governor, the said Defendants (as the Plaintiffs are informed and believe) are about to take over the aforesaid Airport Parkway, and establish it as a "Limited Access Highway", and by establishing physical barriers or otherwise, to prevent the Plaintiffs from entering said highway from their respective properties, and to deprive the Plaintiffs respectively of the right of ingress and egress to and from said highway.

5. Said action of said Defendants will be in violation of the aforesaid provisions of the Constitution of the United States, in that it would deprive the Plaintiffs of their property without due process of law, and will deny to them, respectively, the equal protection of the laws of Pennsylvania.

6. The said statute forbids the payment of consequential damages to abutting owners where a Limited Access Highway [fol. 9] is declared. The Plaintiffs are informed, believe and therefore aver that said Defendants intend to pay nothing to the members of the Plaintiff class. So far as Plaintiffs can learn, from investigation, this is the first, or at least, a very unusual attempt by the officials of Pennsylvania to make use of the said statute. In the principal Limited Access Highway in Pennsylvania, to-wit: the Turnpike, abutting property owners, are permitted by law to receive consequential damages, as Plaintiffs are advised and believe. Thus, the aforesaid unconstitutional statute of 1945, as amended, is discriminatory and confiscatory and in contravention to the provisions of the Constitution of the United States aforesaid; said action of the Defendants will deprive the Plaintiffs and the other members of their class of their property without due process of law, contrary to the provisions of the Constitution as aforesaid. This has been particularly aggravated here because the Governor and the Secretary of Highways, under this Act, thus can do what the present owners of said highways, to-wit: the County of

Allegheny, could not do. Thus, the said Defendants are attempting to accomplish, under the unconstitutional statute aforesaid, what their municipal sub-division, the County of Allegheny, could not accomplish itself.

7. Unless restrained and enjoined, the said Defendants will proceed with their contemplated action, and will, as aforesaid, take away from the members of the Plaintiff class, their direct ingress and egress to and from said highway and otherwise will proceed to the detriment and [fol. 10] loss of the Plaintiffs, as hereinabove averred, and said action, in the circumstances, would also present an impairment of the obligation of contract presented by the circumstances hereinabove set forth, and thus, in violation of the principles of the Constitution of the United States as aforesaid. The precise estimate of the damages, which will result to the Plaintiffs would be difficult, and the Plaintiffs will suffer irreparable injury, unless the Acts ought to be restrained promptly. A remedy at law would not be adequate.

8. It is specifically averred that immediate irreparable damage will be caused to the Plaintiffs by reason of the aforesaid contemplated action of the said Defendants, unless their said action be restrained at once; such restraining order should be entered pending the hearing of the application for an interlocutory injunction.

9. Plaintiffs are advised that this action should be heard by a three-Judge Court—28 USC 2281 et seq.

Wherefore, Plaintiffs are in need of equitable relief and demand judgment as follows:

1. That it be ordered, adjudged and decreed that the aforesaid Pennsylvania statute of 1945, as amended in 1947, is in contravention and violation of the Constitution of the United States and the 14th amendment thereto.

2. That the said defendants, and each of them, be temporarily restrained and then enjoined from declaring the [fol. 11] said highway to be a "Limited Access Highway", and from interfering with direct ingress and egress to and from Plaintiffs property and said highway.



3. That the said Defendants be restrained and enjoined from enforcing the aforesaid Pennsylvania statute with reference to the said highway.

4. That the Plaintiffs be given general relief.

A. E. Kountz, William A. Meyer & Edward P. Good,  
Kountz, Fry & Meyer, Attorneys for Plaintiffs

*Duly sworn to by J. K. Creasy, et al. jurat omitted in printing.*

[fol. 11a]

[File endorsement omitted]

[fol. 12]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—  
Filed August 1, 1955

The Plaintiffs herein move for a Temporary Restraining Order pursuant to the averments in the Bill of Complaint, and in the Affidavit filed.

A. E. Kountz, William A. Meyer & Edward P. Good,  
Kountz, Fry & Meyer.

TEMPORARY RESTRAINING ORDER

This cause came to be heard upon the motion of the Plaintiffs in the above-entitled case, for an interlocutory injunction against the Defendants, namely, Joseph Lawler, Secretary Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of [fol. 13] Pennsylvania, and it appearing to the Court that said Complaint seeks an interlocutory judgment against the Defendants, restraining and enjoining the Defendants from declaring the public highway of approximately five miles in length, extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport, and referred to in the Complaint as "The Airport Parkway" situate in Allegheny County in said district to be a "Limited Access Highway",



and restraining and enjoining said Defendants from interfering with direct ingress and regress (sic) to and from Plaintiffs property and said highway, and enjoining said Defendants from enforcing with reference to said highway the Pennsylvania statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. which attempts to provide for a Limited Access Highway, upon the ground of the unconstitutionality of said Act or statute as provided by Section 2281 of Title 28 of the United States Code, and it further appearing that immediate and irreparable damage will be caused to the Plaintiffs unless a temporary restraining order is issued ex parte and without notice against said Defendants until the hearing of said application for an interlocutory injunction, it is ordered that said Defendants, Joseph Lawler, Secretary of Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and hereby are enjoined from enforcing with reference to said highway the Pennsylvania statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. which attempts to provide for a Limited Access Highway, until the hearing on said application for an interlocutory injunction.

Dated August 1, 1955.

Rabe F. Marsh, United States District Judge.

[fol. 13a]

[File endorsement omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

ANSWER—Filed August 26, 1955

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. The averments of fact set forth in paragraph 1 of the complaint are admitted, subject to the qualification that

every grant of land with the Commonwealth of Pennsylvania, from the time of the original proprietaries, has contained an express reservation to the Commonwealth of six (6%) percent of the land for roads, by reason whereof Plaintiffs' title to the property referred to in the complaint is subordinate to the title of the Commonwealth therein.

[fol. 15] 2. (a) Admitted.

(b) Admitted.

(c) Admitted.

(d) Admitted, subject to the defense that the complaint fails to set forth a cause of action under the Constitution of the United States.

3. The averments of fact set forth in paragraph 3 of the complaint are admitted, subject to the qualification that, in the assessment of said damages, due consideration and weight were given to the effect that the statute cited in paragraph 4 of the complaint has upon Plaintiffs, said statute being then in full force and effect.

4. The first three sentences of paragraph 4 of the complaint are admitted.

The fourth sentence of paragraph 4 of the complaint is denied in its entirety. Although Defendants have been discussing with the proper officials of the County of Allegheny the advisability and feasibility of the Commonwealth's taking over the said highway and establishing it as a "Limited Access Highway," no decision with respect thereto has yet been reached. It is denied that physical barriers are about to be established along said highway; it is alleged, to the contrary, that it is not contemplated that such barriers will be erected even should said highway be declared a "Limited Access Highway." It is denied that Plaintiffs will be deprived of the right of ingress and egress to and from said highway in the event said highway is declared a "Limited Access Highway," for the reason that Plaintiffs will nevertheless have means of ingress and egress by reason of one of the following: (a) the Secretary of Highways has authority to determine the location of points of ingress and [fol. 16] egress to and from said highway, and thus has authority to allow direct ingress and egress to and from

Plaintiffs' properties; (b) the Secretary of Highways has authority to establish local service roads, which afford property owners and tenants adjacent to the limited access highway a means of ingress and egress to and from a highway connecting with the limited access highway; and (c) in the absence of other means of ingress and egress, the property owners affected, under Pennsylvania law, have a right of way of necessity over neighboring lands.

5. Denied.

6. The averment of the first sentence of paragraph 6 of the complaint is admitted, subject to the qualification that the said provision of the said statute is merely declaratory of prior law.

The averment of the second sentence of paragraph 6 of the complaint is admitted, subject to the qualification that, if there should be a taking of property by the Commonwealth under its power of eminent domain, damages will be paid to the members of the Plaintiff class.

The averment of the third sentence of paragraph 6 of the complaint is denied.

The averment of the fourth sentence of paragraph 6 of the complaint is admitted, subject to the qualification that, in the case of the Turnpike, abutting property owners are entitled to receive consequential damages because of an actual taking of property by the Pennsylvania Turnpike Commission.

The averments of the fifth, sixth and seventh sentences of paragraph 6 of the complaint are denied.

7. Denied in its entirety. Defendants allege that Plaintiffs have an adequate remedy at law, since the statutes of [fol. 17] the Commonwealth of Pennsylvania afford property owners the right to petition the Court of Common Pleas for the appointment of viewers; in such a proceeding the liability of the Commonwealth for consequential damages and the rights of Plaintiffs to recover the same may be legally tested.

8. Denied.

9. Admitted.

Wherefore, Defendants demand that Plaintiffs' complaint be dismissed at the costs of Plaintiffs.

/s/ Leonard M. Mendelson, Attorney for Defendants,  
2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 17a] [File endorsement omitted]

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[fol. 18]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—

Filed August 26, 1955

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment for the Defendants on the ground that, as appears from the pleadings, Defendants are entitled to judgment as a matter of law.

Dated: August 26, 1955

/s/ Leonard M. Mendelson, Attorney for Defendants,  
2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 18a] [File endorsement omitted]

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[fol. 19]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

AMENDMENT TO COMPLAINT—Filed September 2, 1955

The Plaintiffs herein named, by their undersigned attorneys, move to amend their Complaint heretofore filed in the following manner:

I. By striking therefrom Paragraph 4 thereof, and inserting in lieu thereof the following:



4. (1) By statute of 1945, amended in 1947 (36 P. S. 2391), the Commonwealth of Pennsylvania has undertaken to permit what are known as Limited Access Highways. A limited access highway is defined in the said statute as "a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor." Said statute provides, inter alia, as follows:

[fol. 20] "(a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway."

The said statute further provides as follows:

"The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political sub-division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

(2) During August of 1955, the exact date being unknown to the Plaintiffs, but well known to Defendants, Defendant Secretary of Highways, or his assistants, caused or permitted an announcement to be made of "plans to take over" the said highway and "convert it into a limited access highway just like the Penn-Lincoln Parkway." This said announcement was made, possibly in several ways, but particularly as follows: The Pittsburgh Automobilst is a magazine published in Harrisburg, Pennsylvania, by the Pennsylvania Motor Club Publications, and in August of [fol. 21] 1955, its issue for that month contained the follow-

ing announcement of plans of the said Defendant; Secretary, by an article including the following:

**"STATE TAKES OVER AIRPORT PARKWAY TO LIMIT ACCESS**

The State Highways Department has announced plans to take over the Airport Parkway and convert it into a limited-access highway just like the Penn-Lincoln Parkway.

The Airport Parkway was built by the County and is virtually the same road as the Penn-Lincoln Parkway built by the State.

However, the State section of the Parkway has been a controlled-access freeway from the start with entrances and exits only at specially constructed interchanges."

The Plaintiffs, despite their efforts, have not been able to obtain, to date, any official statement with regard to the plans of said Defendant; such statements, however, apparently have gone out to non-interested people, as illustrated by the magazine article aforesaid. In other words, the members of Plaintiff class, who are most vitally concerned, and who should have been consulted about the aforesaid matter, have heard nothing officially, and have not been so fortunate as to receive direct information such as evidently was given to the magazine aforesaid, by the Defendants.

Therefore, and in the absence of any forthright disclosure from Defendants with regard to their precise plans, the Plaintiffs, on information received as aforesaid, now aver that it is the intention of said Defendants, as expressed in the magazine article quoted above, to "freeze further roadside development" along said highway, and to provide for [fol. 22] entrances and exits only at specially constructed interchanges, so that no one using said highway could have direct access into or from the lands of the members of the Plaintiff class; all of which will result, as to the improved properties of some of the members of the Plaintiff class, as well as unimproved properties of the other members thereof, in loss in valuation or in good will, business and

trade, or both, amounting to an enormous sum of money in total, and much in excess of one million dollars.

(3) The Plaintiffs, not having been favored with precise information of the "plans" of the Defendants in this regard, from their knowledge of the other highway mentioned in the aforesaid newspaper article and other evidence, believe and now aver that it is the intention of the Defendants to effect the non-access or limited access feature, as to the Plaintiffs' properties, by fences, barriers, grading, curbing or otherwise.

II: By striking therefrom Paragraph 5 thereof, and inserting in lieu thereof the following:

5. Said action of said Defendants will be in violation of the 14th Amendment of the Constitution of the United States, in that it will deprive Plaintiffs of their property without due process of law, and will deny to them the equal protection of the laws of Pennsylvania. Even if the statutes herein referred to were constitutional, the unjustifiable, unconscionable and deceitful abuse thereof as herein set forth should be prevented, restrained and enjoined as a violation of the aforesaid amendment to the Constitution of [fol. 23] the United States. Plaintiffs further contend that said abuse is in particular a denial of the equal protection of the law to Plaintiffs in view of the provisions of Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania, which provides that private property shall not be taken or applied to public use without authority of law, and without just compensation.

A. E. Kountz, William A. Meyer, Kountz, Fry & Meyer, Attorneys for Plaintiffs.

#### Waiver

The Defendants, by their undersigned attorney, waive notice of the filing and presentation of the foregoing Amendment and do not object to the entry of an Order permitting the filing thereof and granting the Defendants 20 days to answer.

/s/ Leonard M. Mendelson, Attorney for Defendants.

## Order

The foregoing Amendment is permitted to be filed this 2nd day of September, 1955; Defendant is directed to answer it within 20 days from the date hereof.

/s/ John L. Miller, D.J.

[fol. 23a] [File endorsement omitted]

[fol. 24]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ANSWER TO AMENDMENT TO COMPLAINT—  
Filed September 7, 1955

First Defense

The complaint as amended fails to state a claim upon which relief can be granted.

Second Defense

Defendants admit the portion of the amendment to complaint which refers to and quotes the statute of 1945, amended in 1947 (36 P. S. 2391), and deny each and every other allegation contained in the amendment to complaint.

Wherefore, Defendants demand that Plaintiffs' amendment to complaint be dismissed at the cost of Plaintiffs.

/s/ Leonard M. Mendelson, Attorney for Defendants, 2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 24a] Acknowledgment of service (omitted in printing).

[File endorsement omitted]



[fol. 25]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO AMEND MOTION FOR SUMMARY JUDGMENT—  
Filed November 16, 1955

Defendants, by their attorney, Leonard M. Mendelson respectfully move that their motion for summary judgment heretofore filed, dated August 26, 1955, be amended so as to include the affidavit attached hereto and that the motion for summary judgment be deemed amended so as to read as follows:

"Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment for the Defendants on the ground that, as appears from the pleadings and affidavit, Defendants are entitled to judgment as a matter of law."

/s/ Leonard M. Mendelson, Attorney for Defendants.

Consented to: Kountz, Fry & Meyer, by Edward P. Good,  
Attorneys for Plaintiffs.

[fol. 26]

AFFIDAVIT OF JOSEPH BARNETT

District of Columbia, ss.:

Before Me, the undersigned authority, personally appeared Joseph Barnett, who, being duly sworn according to law, deposes and says that:

1. He is Assistant Deputy Commissioner, United States Department of Commerce, Bureau of Public Roads, Division of Engineering. He is not connected with the Commonwealth of Pennsylvania nor any of its subdivisions and devotes his entire time and receives his entire salary from the United States.

2. He is a graduate in Civil Engineering from the Cooper Institute of Technology with the degree of Bachelor of

Science in Civil Engineering and later received his Degree of Civil Engineer from the same Institute. He is licensed to practice professional engineering in the State of New York and the District of Columbia.

3. After several years of work for engineering concerns in the design and construction of buildings, bridges, and structures, he joined the staff of the Westchester County Park Commission in New York in 1925 and for the next eight years assisted in the pioneer development of parkways and expressways which established a pattern for such facilities in metropolitan areas. He has been an engineer with the Bureau of Public Roads since December 1933. He was in charge of the design of some outstanding expressway projects, including a portion of the George Washington Memorial Parkway and the Pentagon Road Network in Virginia. In 1944 he was made Chief of the newly organized Urban Highway Branch, in which capacity he advised States and cities in their planning, development, and design of arterial highway routes. As Secretary of the Committee on Planning and Design Policies of the American Association of State Highway Officials he has developed design policies and standards adopted by that Association. He has been Assistant Deputy Commissioner since September 1953, in charge of five branches in the Division of Engineering.

[fol. 27] 4. He believes that arterial highways best serve the needs of the traveling public and the economy of this country when they are designed in such manner as to enable traffic to flow without interruption, to maintain the capacity to handle traffic, and to minimize the hazards of travel. He has concluded that these objectives can be realized to the maximum degree where the highway is designed with full control of access, sometimes referred to as limited access. He believes that most communities are familiar with and have examples of arterial highways which were designed and constructed in the best possible manner except that access was not controlled and which after being opened to traffic steadily lost their capacity to accommodate traffic and became inadequate not because of increased traffic volume but because of interference from uncontrolled road-sides, with roadside businesses vying with one another for the attention and patronage of travelers. This is par-

ticularly noticeable in urban and suburban areas where this lack of access control soon results in traffic congestion, reduction of highway capacity, and increase in accident experience.

5. He has concluded that one of the principal advantages of a controlled access highway is its ability to accommodate a much greater volume of traffic than one without such access control. In urban and suburban areas a highway with full control of access can accommodate 1500 to 2000 vehicles per lane per hour, depending upon the physical characteristics of the highway and the percentage of trucks, whereas the same highway without access control and with roadside businesses developing alongside has a capacity from 300 to 1000 vehicles per lane per hour, depending also on the physical characteristics of the highway and the percentage of trucks but depending even to a greater degree on the interference from the roadsides and the frequency of crossings at grade which inevitably delay traffic to such an extent that traffic light control ultimately becomes necessary.

6. In his opinion, there is a sufficient mileage of controlled access highways now in operation, and sufficient data regarding those controlled access highways, to provide, with respect to accident rate, a reliable comparison with uncontrolled access highways. Attached hereto and [fol. 28] made part hereof is Circular Memorandum No. F-2.22 of the United States Department of Commerce, Bureau of Public Roads, dated April 25, 1955, entitled "Accident Experience on Controlled Access Highways," to which memorandum are attached tables setting forth the accident rates on typical highways with full control of access, typical highways with partial control of access, and typical highways with no control of access. The attached Circular which he believes to be accurate points to the conclusion that control of access results in substantial reduction of traffic accidents. Deponent, on the basis of this and similar studies, believes that the accident and mortality rate of the controlled access highway is less than one-half that experienced on the uncontrolled access highway.



7. Deponent has computed the cost of accidents on the basis of costs and accident statistics of the National Safety Council, which he believes to be accurate, and has estimated that the cost of accidents in the United States is about 0.8 cent per vehicle mile of travel. Since controlled access highways have less than one-half the death and accident rate of the national average, it may be conservatively estimated that the savings due to accident reduction likely to be realized by full control of highway access is 0.4 cent per vehicle-mile of travel.

8. He believes that experience has demonstrated that the controlled access highway, by facilitating the flow of traffic, will save a vast amount of man-hours of time. Furthermore, the controlled access highway, by eliminating stops and delays, reduces the operating cost of vehicles.

9. Deponent believes that long-range economy is a distinct benefit of the controlled access highway, since a highway without access control loses its ability to handle the amount of traffic for which it was designed when roadside businesses develop along it, and a new highway becomes necessary to relieve congestion and accommodate the design traffic volume. Highways subject to access control may be reasonably expected, with proper maintenance and occasional resurfacing, to retain their full traffic capacity.

10. Deponent believes he has accurately reflected the consensus of highway engineers in the views herein expressed; moreover, he believes that the rapid increase [fol. 29] in creation and utilization of controlled access highways is a manifestation of the efforts which the highway engineers have exerted toward obtaining acceptance of the principle. Deponent further believes that the traveling public favors the ease of driving, the saving of time, the saving in cost of vehicle operation, and the reduction in accidents experienced on controlled access highways and their willingness to pay for such savings and values is reflected by the widespread and increasing use of toll roads which are highways with full control of access.

11. In conclusion, deponent believes that it may be fairly said that the controlled access highway has become an



indispensable feature of any arterial highway designed to accommodate a large volume of traffic. Particularly would this be true of a highway which serves as the principal means of vehicular communication between a large metropolitan area like Pittsburgh and its airport.

/s/ Joseph Barnett

Sworn to and subscribed before me this 10th day of November, 1955.

/s/ Mary A. Beall, Notary Public.

(Seal)

[fol. 30]

ATTACHMENT TO AFFIDAVIT  
DEPARTMENT OF COMMERCE  
BUREAU OF PUBLIC ROADS  
Washington 25, D. C.

F-2.22

April 25, 1955

CIRCULAR MEMORANDUM TO: Division Engineers

FROM: E. H. Holmes, Acting Deputy Commissioner

SUBJECT: Accident Experience on Controlled Access  
Highways

Data on the relation of access control to accident frequency, compiled during the last few years with the cooperation of a number of the State highway departments, indicate that superior safety is a remarkably consistent benefit of controlled access highways. The attached tabulations contain the accident records of facilities with full, partial, and no control of access. The experience in 19 States and the District of Columbia is presented. More than 2,000 miles of streets and highways have been classified as to their access control characteristics, and the gross records include over 36½ billion vehicle-miles of travel, and approximately 108,000 accidents, in which more than 2,500 persons were killed. Combining the entire mileage

thus far embraced by the study, we find the general rates indicated below:

Control of access	Number per 100 million vehicle-miles	
	Fatalities	Accidents
Full .....	2.8	171
Partial .....	9.6	240
None .....	8.0	408

Despite the subsequent addition of a considerable increment of mileage and accident experience, these rates do not differ greatly from those shown in the summaries distributed with our memorandum of October 12, 1953, on the same subject. Now, as then, it is pointed out that the substantial amount of California and Connecticut experience included makes the reported rates only approximately typical of the actual that might be obtained if data were available for all highways of these types. In this connection, the high fatality rate and intermediate accident rate for highways with partial control of access will be noted.

[fol. 31] The reported accident experience differs rather widely between rural and urban conditions as might be expected. The rates for facilities in these areas and in localities that are partly urban and partly rural are shown in the following table:

Degree of access control	Length (miles)	Vehicle-miles (1000's)	Number of		Number per 100 million vehicle-miles	
			fatal- ities	acci- dents	fatal- ities	acci- dents
RURAL AREAS						
Full .....	297.09	5,520,204	175	10,316	3.2	187
Partial .....	805.15	9,161,041	898	19,797	9.8	216
None .....	698.80	11,510,739	993	42,661	8.6	371
URBAN AREAS						
Full .....	136.53	4,991,800	115	7,696	2.3	154
Partial .....	34.60	520,040	30	3,236	5.8	622
None .....	50.24	879,047	36	6,601	4.1	751
PARTLY RURAL, PARTLY URBAN AREAS						
Full .....	NO	DATA		AVAILABLE		
Partial .....	9.40	76,264	6	421	7.9	522
None .....	149.38	3,876,402	274	17,094	7.1	441

Analysis of other factors involving access control and accident frequency is proceeding, using the data supplied on the PR-761 forms received since the October 1953 summary was issued. Certain relations involving accident severity, manner of collision, traffic volume, and design elements with the varying degrees of access control will be defined as additional comparative records become available for study. From the work thus far, it is clear that facilities with full control of access have an unusual accident problem in that rear end collisions are involved in well over half the accidents. Another preliminary finding that deserves mention concerns the severity rate, i.e., the number of deaths per 100 accidents. On rural highways with partial control of access, the severity rate is substantially higher than under any other conditions.

[fol. 32] The overall safety benefits of access control are plainly evident from the information already assembled. These benefits cannot be fully evaluated, however, without much more data than are currently available. With this objective in mind, it is requested that the Division Engineers ask all States to collect and supply the Washington office with records on comparable sections in both rural and urban areas where differences in access control characteristics exist. Data should be reported on our PR-761 form. It will be particularly helpful to have additional accident data for sections on which PR-761's have been completed previously, and for any other controlled access highways that have been in service for at least a year. Instructional notes have been prepared to aid in the preparation of the PR-761 and a supply of these and of the forms are being sent to each Division office.

Summaries will be prepared periodically so that the results may be of maximum benefit to the cooperating States.

Attachments



Table 1.--Accident experience: Highways with full control of access

P31 (SHEET 1)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of		Rate 2/ of	
							Fatalities	Accidents	Fatalities	Accidents
Calif.	14 Route Sections	R	40.25	1949-1953	24,880	639,643	17	826	2.7	129
Calif.	Indiana St. to Las Vegas St., Los Angeles (VII-LA-2-LA)	U	3.01	1/1/52-6/30/54	46,253	127,000	1	208	0.8	164
Calif.	So. San F. to Eo. of Burlingame (S. M. 68 - SSP, -F, - Millbrae)	U	5.08	1/1/52-6/30/53	47,200	131,280	3	144	2.3	110
Calif.	Ramona Freeway	U	3.65	1948, '49, '51-'53	39,500	205,440	8	301	3.9	147
Calif.	Hollywood Freeway (Highland to Vineland)	U	2.94	1948, '49, '51-'53	83,200	403,170	11	610	2.7	151
Calif.	Hollywood Freeway (4-level to Cahuenga)	U	5.51	2/51-53	78,800	388,370	7	449	1.8	116
Calif.	Arroyo Seco (Route 205 to Pasadena)	U	6.12	1941-49, '51-'53	32,000	705,000	12	927	1.7	131
Calif.	Arroyo Seco (Route 165 to Los Angeles)	U	2.03	1948, '49, '51-'53	79,850	246,290	8	369	3.2	150
Calif.	Santa Ana Freeway (Muham to 4-level structure)	U	11.55	1951-1953	45,380	337,160	3	456	0.9	135
Calif.	Carlsbad-Oceanside Freeway (San Marcos Creek to Las Encinas)	U	2.40	1953	12,630	11,070	0	35	0.0	316
Calif.	Cabrillo Freeway	U	4.70	5/48-4/49, '51-'53	24,700	161,710	4	315	2.5	195
Calif.	North Sacramento Freeway (Route 3)	U	4.24	1948, '49, '51-'53	24,500	189,680	5	306	2.6	161
Calif.	Bayshore Freeway (So. San Francisco to San Mateo)	U	8.48	1948, '49, '51-'53	82,785	586,060	13	625	2.2	107
Calif.	Bayshore Freeway (Army St. to Augusta St.)	U	1.30	1952-1953	54,000	47,190	3	116	6.4	245
Calif.	Presidio Freeway (San Francisco)	U	1.44	1951-1953	24,200	38,290	0	78	0.0	204
Calif.	Eastshore Freeway (Fallon St., Oakland, to Jackson St.)	U	14.57	1951-1953	43,200	453,770	17	672	3.7	148
Calif.	San Rafael Freeway (US 101)	U	1.63	1951-1953	18,540	33,090	0	33	0.0	100
Calif.	Montgomery Freeway	U	5.81	1952-1953	18,200	66,620	2	117	3.0	176
Calif.	Pittsburg-Antioch Freeway	U	5.30	1953	7,230	7,970	0	7	0.0	88
Calif.	All California Urban Full Control	U	3/89.76	1941-49, '51-'53	41,650	4,139,160	97	5,768	2.3	139
Conn.	Merritt Parkway (N.Y. State Line to Stratford)	R	37.46	1940-52	15,000	2,671,000	100	6,473	3.7	240
Conn.	Wilbur Cross Parkway (Milford to US 5 N. of Meriden)	R	29.47	1946-52	15,000	824,000	11	1,458	1.3	180
Conn.	South Meadows Expressway (Wethersfield to US 5A, Hartford)	U	3.84	1946-52	21,000	207,200	0	441	0.0	210
Conn.	Charter Oak Bridge and Toll Plaza, Hartford	U	1.04	1946-52	28,000	74,700	0	334	0.0	450
Conn.	Wilbur Cross Highway (East Hartford to Vernon)	R	9.20	1946-52	17,000	233,000	2	359	0.9	150
Conn.	Riverfront Boulevard, US 5A & Conn. 9, Hartford (including ramps to Charter Oak Bridge)	U	0.89	1946-52	26,000	58,300	5	162	8.6	280
Conn.	Veterans' Highway, US 5A (Hartford to Windsor)	U	2.71	1951-52	13,000	26,000	2	24	7.7	90
Conn.	Commodore Hull Bridge & approaches, Derby	U	1.20	1952	6,600	2,900	0	9	0.0	310
D. C.	Whitehurst Freeway	U	0.76	1950-53	28,150	31,204	0	23	0.0	74
D. C.	South Capitol Street	U	2.14	1950-53	25,460	73,411	2	113	2.5	142
D. C.	Canal Road	U	1.59	1950-53	5,220	12,106	0	32	0.0	264
D. C.	Dalecarlia Parkway	U	0.95	1950-53	3,125	4,325	0	2	0.0	46
Ga.	North-South Expressway in Atlanta (Hunnicutt St., NW to Peachtree Street, NE)	U	2.93	1952-53	21,500	45,943	2	50	4.4	109
Ga.	North-South Expressway in Atlanta (University Avenue to Fulton-Clayton County line)	U	5.23	10/52-12/52, '53	11,300	27,617	4	66	14.5	239
Md.	Baltimore-Washington Expressway	R	5.3	7/51-6/52	3,280	6,360	0	3	0.0	47
Mass.	Route 128, Wellesley (Rte. 9 to Wakefield-Lynnfield line-East boundary)	R	24.6	1952-53	20,060	360,206	9	235	2.5	65
Mass.	Route 6 (from Route 130 to Route 132, Barnstable)	R	9.5	1952-53	4,000	27,740	1	18	3.6	65
Mass.	Route 15 (from Route 20, Sturbridge, to Connecticut line)	R	6.7	1952-53	10,320	50,451	1	35	2.0	69
Mass.	New Route 2 from Concord west	R	11.06	1953	6,000	24,221	1	21	4.1	87
Mass.	New Route 138 between Raynham and Fall River	R	11.8	1953	3,900	16,797	1	8	5.9	48
Mich.	Michigan 112 - Detroit Industrial Expressway (Romulus to Melvindale)	R	12.25	1948-53	18,100	485,577	24	636	4.9	131
Mo.	Southwest Trafficway, Kansas City (14th St. to 26th St.)	U	1.16	12/50-7/52	30,000	20,000	0	17	0.0	85
Okl.	Turner Turnpike (Oklahoma City to Tulsa)	R	88.00	5/53-11/53	3,760	66,142	3	68	4.5	103
R. I.	Olneyville Bypass (Plainfield St. to Harris Avenue, US 6)	U	3.63	1953	7,410	9,817	0	37	0.0	377



Table 1.—Accident experience: Highways with full control of access (continued)

P. 31 (SHEET 2)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of		Rate 2/ of	
							Fatalities	Accidents	Fatalities	Accidents
Texas	Gulf Freeway in Houston	U	9.20	10/48-9/53	108,000	387,000	6		1.6	
Texas	US 75 in Houston (Scott St. to Woodridge)	U	3.88	1952	46,610	66,008	1	159	1.5	241
Texas	Central Expressway in Dallas (Live Oak St. to Webb Street)	U	3.00	1952	33,290	36,450	0	51	0.0	140
Texas	State 550 in Fort Worth (Camp Bowie Blvd. to Summit Avenue)	U	3.95	1952	21,530	31,041	0	59	0.0	190
Texas	US 81 in Fort Worth (Seminary Drive to E. Rosedale Avenue)	U	3.41	1952	9,400	11,700	0	31	0.0	265
Texas	US 87 Expressway in San Antonio (Woodlawn Ave. to Poplar St.)	U	1.44	1952	20,140	10,586	1	24	9.4	227
Va.	Shirley Highway, Section 1A, Fairfax County	R	11.50	9/49-12/52	10,740	115,067	5	176	4.3	153
Va.	Shirley Highway, Section 2A, Arlington	U	2.50	1951-52	31,450	57,389	1	145	1.7	253
Va.	US 1 (Abutments Twin Highway Bridges to Jct. with Shirley Highway - Arlington County)	U	0.52	3/51-12/53	74,230	39,943	0	149	0.0	373
Total	.....	.....	433.62	.....	.....	10,512,004	290	18,012	2.8	171

1/ R = rural; U = urban

2/ Number per 100 million vehicle-miles

3/ Total mileage figure below does not include duplicated mileage introduced by this entry.

Table 2. Accident experience: Highways with partial control of access

P. 31 (SHEET 3)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles-Thousands	Number of		Rate 2/ of	
							Fatalities	Accidents	Fatalities	Accidents
Calif.	118 Route Sections	R	548.27	1949-1953	10,270	7,611,282	789	15,809	10.4	208
Calif.	Luttwiler St. to near Rosecrans Ave., Los Angeles (LA-174-B)	U	3.43	1/1/52-6/30/54	28,950	90,600	6	232	6.6	256
Calif.	Lerdo to 0.77 mi. north of Bakersfield C.L. (Kern 40 and 4D)	R	9.69	1952-1953	15,771	110,900	9	158	8.1	143
Colo.	West Sixth Ave. (FA2, US 6, SR 182; Sheridan Blvd. at W.C.L., Denver to Jct. US 6-40)	R	7.34	1951-1953	6,270	49,980	4	251	8.0	502
Colo.	East 46th Ave. and Vasquez Blvd. (Brighton Blvd. to Adams City)	U & R	4.03	1951-1953	14,700	63,720	6	387	9.4	607
Colo.	East C.L. Denver to Castle Rock (FA2, US 87, SR 185)	R	21.10	1953	4,374	33,686	0	31	0	92
Conn.	Wilbur Cross Highway, Conn. 15 (Vernon to Mass. State Line)	R	24.75	1952	11,700	106,000	6	196	5.7	185
Conn.	US 1 (including Baldwin & Gold Star Bridges)	R	17.54	1946-52	4,600	207,800	5	597	2.4	290
Conn.	Conn. 9, Middletown (0.7 mi. So. of Cromwell - Middletown T.L. to Main Street Extension)	U	1.26	1952	8,300	3,800	0	0	0	184
D. C.	New York Avenue	U	1.85	1950-53	21,500	58,098	2	263	3.4	453
Ga.	US 41 - Bartow Co. (Bartow-Cobb Co. line to 3.38 miles north)	R	3.38	1952-53	6,750	16,655	0	16	0	96
Ga.	US 41 - Cobb Co. (from SR 5 to Cobb-Bartow C.L.)	R	13.00	1952-53	6,050	57,467	2	103	3.5	179
Ga.	US 41 - Clayton Co. (Fulton-Clayton C.L. to 5.37 mi. South)	U & R	5.37	1953	6,400	12,544	0	34	0	271
La.	US 71 - Alexandria Bypass (Lee St. to Bolton Ave)	U	4.82	1950-52	11,730	24,964	0	80	0	320
Md.	US 40 (Pine Orchard to West Friendship)	R	5.4	7/51-6/52	5,190	10,255	0	12	0	117
Mass.	SR 128 (Lynnfield-Wakefield line to Danvers-Beverly line)	R	8.9	1952-53	10,000	65,086	2	178	3.1	273
Mass.	US 6 (Salem Bridge to SR 130)	R	3.5	1952-53	3,200	8,176	0	10	0	122
Mass.	SR 2 (between Leominster and Westminster)	R	8.8	1953	6,000	19,316	1	15	5.2	78
Minn.	T.H. 36, N. of St. Paul	R	7.8	1948-52	5,400	77,333	12	242	15.5	313
Minn.	T.H. 36, N. of St. Paul	U	7.8	1953	7,000	19,914	0	61	0.0	306
Minn.	T.H. 100, near Minneapolis	U	7.62	1948-53	12,700	212,096	16	1,315	7.5	620
Minn.	US 12 & 61 (Wilson Ave. to Hazelwood St., St. Paul)	U	1.68	1952-53	13,100	16,066	3	75	18.7	467
Ohio	US 40 (Clark County - Springfield to Vienna)	R	7.38	1951-52	7,600	41,000	1	93	2.4	227
Ohio	US 22 & SR 3 (Warren and Clinton Cos.-around Clarksville)	R	6.76	1951-52	3,050	14,800	5	23	33.8	155
Okla.	US 77 (Through Ardmore-Myall St., north to 12th Avenue)	U	2.00	7/52-7/53	5,494	4,011	0	26	0	648
Ore.	Sunset Highway, US 26 (Jct. Oregon 47 to Jct. Oregon 6)	R	22.03	1949-52	3,220	103,401	14	298	13.5	288
Ore.	Pacific Highway, US 99 (Asasala to Ox Yoke)	R	23.27	1949-52	2,760	93,489	10	203	10.7	217
Ore.	Pacific Highway East, US 99E (N. Jefferson Jct. to N. Albany Jct.)	R	10.57	1948-52	6,480	124,906	8	417	6.4	334
Ore.	Pacific Highway East, US 99E (Halsey to Harrisburg)	R	7.85	1946-52	3,990	80,020	9	130	11.3	163
Ore.	S.W. Harbor Drive (Portland)	U	2.14	1949-52	25,500	79,654	3	1,139	3.8	1430
R. I.	R. I. 146 - Louisaquisset Pike (Park Ave., Woonsocket to north of Cobble Hill Road)	R	7.7	1953	7,600	21,355	1	33	4.7	155
S. D.	US 14-16 (East city limits of Rapid City, 7.314 miles east) - new route, opened 12/15/52	R	7.31	1953	8,540	22,799	1	52	4.4	228
Ya.	US 58 (Norfolk to Virginia Beach)	R	4.01	1951	17,030	24,938	1	152	4.0	610
Wash.	US 10 (Seattle to Issaquah)	R	13.8	1949-52	9,270	186,772	9	557	4.8	298
Wash.	US 99 (Castle Rock to Kalama) New Route	U	15.0	1951-52	6,750	73,625	9	221	12.2	300
Wyo.	US 87 (2.5 miles east of Casper to 0.5 miles east of Casper)	U	2.0	1951-52	7,425	10,837	0	38	0.0	351
Total			841.35			9,757,345	934	23,454	9.6	240

1/ R = rural; U = urban.

2/ Number per 100 million vehicle-miles

3/ Total mileage figure below does not include duplicated mileage introduced by reclassification of this entry from "Rural" to "Urban."



Table 3.--Accident experience: Highways with no control of access

P 31 (SHEET 4)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of		Rate $\frac{2}{1}$ of	
							Fatalities	Accidents	Fatalities	Accidents
Calif.	Rural State Highways (4 or more lanes-Undivided)	R	179.00	1951-1953	21,030	4,304,486	328	16,322	7.6	379
Calif.	Rural State Highways (4 or more lanes-Divided)	R	247.00	1951-1953	14,970	4,222,446	381	14,156	9.0	335
Calif.	Redwood City to San Mateo (S.M. 68-C, -San Car., -Belmont)	U	4.90	1/52-6/30/53	35,500	95,240	3	322	3.2	338
Calif.	South, from 1.07 mi. s. of Bakersfield C.L. (Kern 4-C)	R	10.56	1952-1953	14,332	110,500	32	429	29.0	388
Colo.	West Colfax Avenue (Sheridan Blvd. at W.C.L., Denver, to jct. US 6-40)	R	7.41	1951-1953	11,700	94,608	6	571	6.3	604
Colo.	Brighton Blvd. and Old Brighton Road (FAS 65, S.R. 265)	U & R	3.63	1951-1953	4,160	16,529	1	73	6.0	442
Colo.	Denver to Castle Rock (FA 2, US 85, SR 1)	U & R	21.90	1953	5,872	46,939	1	225	2.1	479
Conn.	Wilbur Cross Highway - Vernon to Mass. line	R	24.74	1946-51	5,800	314,470	26	773	8.3	246
Conn.	US 1 and 1A - N.Y. line to New Haven	U & R	42.70	1940-52	13,500	2,734,000	222	13,143	8.1	480
Conn.	Conn. 34 (Conn. 115, Derby to Conn. 122, West Haven)	U & R	6.92	1949-52	11,000	112,500	4	404	3.6	360
Conn.	Berlin Turnpike - Meriden to Wethersfield	R	11.06	1946-52	18,000	509,000	41	1,514	8.1	300
Conn.	Bulkeley Bridge and eastern approach US 44 (US 5A, Hartford to US 5, East Hartford)	U	1.25	1946-52	27,000	85,400	3	569	3.5	670
Conn.	US 5 (East Hartford to S. Windsor - E. Windsor T.L.)	U & R	6.86	1946-52	9,100	160,200	7	457	4.4	290
Conn.	Conn. 2 & US 5, East Hartford (0.71 mi. so. to 0.61 mi. no. of Conn. 15 & US 6)	U	1.32	1946-52	23,000	77,500	5	706	6.5	910
Conn.	US 5A, Windsor (Hartford-Windsor T.L. to Conn. 75, Windsor)	U	3.77	1946-52	12,500	120,900	6	711	5.0	590
Conn.	Conn. 8 (Conn. 127, Bridgeport to 1 mile so. of Derby T.L.)	U & R	8.08	1949-52	5,800	68,700	8	180	11.6	260
Conn.	US 1 (Quinnipiac River, New Haven to Conn. 80, Old Saybrook)	R	32.01	1946-52	6,900	563,000	46	1,811	8.2	320
Conn.	US 1 (US 1A, Groton to Rhode Island line)	R	14.56	1946-52	5,100	190,200	5	527	2.6	310
Conn.	US 6A, Portland (Conn. 17-a to east 0.83 mile)	U	0.83	1946-52	6,700	14,200	1	124	7.0	870
D. C.	M Street (39th to 36th Streets)	U	0.65	1950-53	18,900	18,006	0	176	0.0	977
D. C.	Nichols Avenue	U	2.11	1950-53	14,480	44,570	1	259	2.2	581
D. C.	MacArthur Blvd.	U	0.92	1950-53	6,930	9,335	0	32	0.0	343
Ga.	US 41-Fulton Co. (Northside Drive to Fulton-Cobb Co. line)	U	3.92	1952-53	14,750	42,211	2	107	4.7	253
Ga.	US 41-Cobb Co. (Fulton-Cobb Co. Line to SR 5)	U & R	10.19	1952-53	13,090	97,350	2	276	2.1	284
Ga.	West Bypass in Atlanta (Whitehall St., SW to 14th St., NW)	U	3.50	1952-53	22,250	56,849	1	237	1.8	417
La.	US 190-Baton Rouge Bypass (Florida St. to Scenic Hwy.)	U	6.70	1950-52	8,750	64,194	4	416	6.2	648
Md.	US 40 (Baltimore line to Pine Orchard)	U & R	9.4	7/51-6/52	11,220	38,599	2	130	5.2	337
Mass.	Route 9 (Brookline to Framingham-Southboro Line)	U & R	19.9	1952-53	26,160	372,753	15	1,246	4.0	334
Mass.	Route 1 (Malden to Peabody-Danvers line)	U & R	7.8	1952-53	17,900	101,606	3	397	3.0	391
Mass.	Route 28 (Falmouth to Route 132)	R	19.5	1952-53	4,490	63,925	9	61	14.1	95
Mich.	US 112--Wayne County (Ypsilanti to Elioise)	R	9.84	1948-53	11,500	248,179	14	1,344	5.6	542
Minn.	Summit Avenue-St. Paul (Lexington Avenue to Cleveland Avenue)	U	2.02	1949-53	14,520	53,533	2	241	3.7	450
Minn.	Marshall Avenue-St. Paul (Lexington Avenue to Cleveland Avenue)	U	1.98	1949-53	15,880	57,346	4	475	7.0	828
Minn.	T.H. 106 and 5, south of Minneapolis	U & R	12.00	1948-52	5,800	127,226	7	563	7.1	443
Minn.	T.H. 100 and 5, south of Minneapolis	U	3/8.10	1953	9,300	28,966	0	149	0.0	514
Mo.	Broadway Street-Kansas City (14th Street to 26th Street)	U	1.20	12/50-7/52	15,000	10,000	0	132	0.0	1320
Mo.	Truman Road-Kansas City (Oak Street to Brooklyn Avenue)	U	1.20	12/50-7/52	25,000	17,000	1	504	5.9	2965
Ohio	US 40 (Madison C. L. to Columbus)	R	7.53	1951-52	11,000	60,400	7	165	11.6	273
Ohio	US 22 & Ohio 3-Clipton Co. (Jct. O-380 to Wilmington)	R	4.68	1951-52	2,150	7,400	0	26	0.0	351
Ore.	Columbia River Hwy, US 30 (Portland to Scappoose)	R	10.80	1949-52	4,160	65,577	7	269	10.7	410
Ore.	Sunset Highway, US 26 (Jct. Oregon 53 to Jct. Oregon 47)	R	39.51	1949-52	1,840	106,238	19	568	17.9	534
Ore.	Pacific Highway East, US 99E (Salem to N. Jefferson Jct.)	R	8.72	1948-52	6,640	105,826	12	496	11.3	469
Ore.	Pacific Highway East, US 99E (Albany to Tangent)	R	5.53	1946-52	5,310	75,009	9	272	12.0	363
Ore.	S.E. Union Avenue (Portland)	U	1.47	1949-52	24,100	51,736	0	1,173	0.0	2270

Table 3.—Accident experience: Highways with no control of access (continued)

P. 31 (SHEET 5)

State	Route	Type of area <sup>1/</sup>	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of		Rate <sup>2/</sup> of	
							Fatal-ities	Acci-dents	Fatal-ities	Acci-dents
R. I.	R.I. 122, Mendon Road (Woonsocket to Valley Falls)	R	6.6	1953	6,380	15,365	4	50	26.0	325
R. I.	Olneyville Square, Providence, and the 7 major roads serving the square within the limits of Olneyville Bypass	U	1.4	1953	12,990	6,639	0	39	0	587
S. D.	US 14-16 (E. city limits of Rapid City, 7.314 miles east) - Old route	R	7.31	1950-52	6,740	54,030	4	171	7.4	316
Va.	US 1, Section 1, Fairfax County	R	13.30	9/49-8/50, '51, '52	9,960	150,672	24	911	15.9	605
Va.	US 1, Section 2, Arlington	U	1.50	1951-52	20,250	22,176	2	191	9.0	861
Va.	Route 168 (J. of Newport News)	R	6.54	1951	9,200	21,968	2	223	9.1	1015
Wash.	US 10 (Spokane East to Greenacres)	R	8.5	1949-51	9,500	88,400	4	707	4.5	800
Wash.	Seattle to Bothell (FSH #2)	R	8.1	1949-51	11,700	104,000	8	927	7.7	890
Wash.	US 99 (Castle Rock to Kalama) - Old route	R	16.0	7/48-6/49	6,000	35,040	5	298	14.3	850
Wyo.	US 20 & 26 (1.5 miles west of Casper to west corporate limits)	U	1.5	1952	5,928	3,246	1	38	30.8	1171
Total	.....	.....	890.32	.....	.....	16,266,188	1,303	66,356	8.0	408

<sup>1/</sup> R = rural; U = urban<sup>2/</sup> Number per 100 million vehicle-miles<sup>3/</sup> Total mileage figure below does not include duplicated mileage introduced by reclassification of this entry from "Rural & Urban" to "Urban."



[fol. 38]

## IN THE UNITED STATES DISTRICT COURT

ORDER OF COURT—November 16, 1955

And Now, to-wit, this 16 day of November, 1955, defendants' foregoing motion to amend their motion for summary judgment will be and hereby is granted.

/s/ Rabe F. Marsh, D.J.

[fol. 38a]

[File endorsement omitted]

[fol. 39]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHALL and ALICE E. MARSHALL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Commonwealth of Pennsylvania,  
County of Allegheny, ss.:

AFFIDAVIT OF LEONARD P. KANE OFFERED BY PLAINTIFFS IN  
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—  
Filed November 25, 1955

Leonard P. Kane, being duly sworn, deposes as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania, and I am a duly licensed real estate broker there.

2. In the past, I have testified as an expert on real estate [fol. 40] valuations and related and similar subjects in Pittsburgh on frequent occasions.

3. My qualifications include the following:

(a) I am familiar, in a general way, with the litigation pending at the above numbers, wherein the Plaintiffs are various property owners, owning real estate which abutts the highway approximately five miles in length immediately west of the Greater Pittsburgh Airport, and commonly known as the Airport Parkway.

(b) At the time that the highway was designated as open, which was approximately in the year 1949, I was consulted by one or more of the property owners whose property, in part, was taken by eminent domain by the County of Allegheny for the purposes of said highway, and who were left with the remaining portions of their respective tracts, and who desired damages from the County of Allegheny by reason of said taking. Pursuant to the practice in Pennsylvania, the claims of those owners, whose land, in part, had been taken for the purposes of said highway, came to be heard in the first instance before viewers, duly appointed by the Court of Common Pleas of Allegheny County, Pennsylvania, for the purposes of ascertaining the damages which should be payable in each instance. Those particular hearings were before the panel of viewers composed of Messrs. McJunkin, Scanlon and Donaldson. One of those viewers, Mr. Scanlon, since has died, and Mr. McJunkin is reported very seriously ill in a hospital, and un-

able to appear in court. The third member, Mr. Donaldson, I am informed, now resides in Chicago, Illinois.

[fol. 41] (c) In negotiations, and conversations which I had with the attorney representing the County of Allegheny, and in the proceedings before the said viewers, all of which were in regard to how much damages should (sic) be paid to the people for whom I spoke, it was the County's contention and the position adopted by the viewers, that any award of damages for the taking of land should be diminished by reason of benefits which inevitably would accrue to the land remaining to the owners, because of such land having direct and uninterrupted access to the new highway with all the commercial development that such access would make possible. The viewers stated to me, in each instance, categorically and directly, that there was no indication that anyone would ever attempt to obstruct, in any way, the free and direct access of the owners to the new highway and that such possibility must be denied any consideration in the matter of fixing awards of damages. The responsible officers of Allegheny County in charge of this work repeatedly informed me that such was the County's position.

The said highway is now open and the abutting property owners, who constitute the Plaintiff class in the above-captioned actions are deriving or in the future will derive great financial benefits from the direct access which they have; this is particularly true with regard to gasoline filling stations which recently have been erected on two or more of said abutting pieces of land, and of restaurants, mercantile or business establishments, amusement parks, and other commercial developments, which have been placed there. The possibility of development and enhancement of land values with reference to the other abutting pieces of land on said highway will depend, to a very large extent, upon the feature of direct access to said highway.

[fol. 42] It is obvious that a mercantile or business establishment, gasoline filling station, amusement park or other business, will lose a great percentage of the trade which otherwise it would have, should its direct access to the highway be cut off, and consequently, the value of such property on the market will depreciate greatly. Being familiar with these properties as I am, and having observed them recently,

and having testified with reference to one or more of them in the viewers proceeding aforesaid, I believe that the shutting off of direct access to the highway, with reference to said properties, will reduce them, from the standpoint of valuation, to the grade of farm land or lower, since many of these properties have been rendered unusable for farming by the new highway, with its many cuts and fills. In this instance, such down-grading will probably mean a reduction of at least 75% in their market valuation. Already, semi-public announcements that access will or may be barred, emanating from the Highway Department or from other sources have had a chilling effect upon the public's idea of the value of the abutting lots, and unless this fear is removed, it is only reasonable to suppose that the chilling effect will continue and further depreciation in value can be expected in the immediate future. In the aggregate, the depreciation in the abutting land along the said five mile stretch, which will result from the shutting off of direct access, will produce loss in market valuations, probably in excess of \$1,000,000.00, and in my opinion, the loss might be greatly above that figure.

/s/ Leonard P. Kane

(Seal)

Sworn to and subscribed before me the 13th day of October, 1955.

(Seal)

/s/ Edward P. Good, Notary Public, Pittsburgh, Allegheny County. My Commission Expires May 11, 1959.

[fol. 42a]

[File endorsement omitted]

Acceptance of service (omitted in printing).



[fol. 43]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILO, ED KLEEMAN and R. D. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHALL and ALICE E. MARSHALL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Commonwealth of Pennsylvania,  
County of Allegheny, ss.:

AFFIDAVIT OF J. CAL CALLAHAN OFFERED BY PLAINTIFFS IN  
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—

Filed November 29, 1955

J. Cal Callahan, being duly sworn, deposes as follows:

1. I am Director of the Planning and Transportation  
Division of Morris Knowles, Incorporated, a firm of Civil  
Engineering Consultants with home offices in Pittsburgh,  
Pennsylvania. I reside at 115 Parker Avenue, Easton,  
Pennsylvania, and I maintain my office in that City.

[fol. 44] 2. I am a graduate in Civil Engineering from the University of Michigan with the degree of Bachelor of Science in Civil Engineering. I attended Xavier University in Cincinnati, Ohio, preparatory to my enrollment in Engineering School. At the University of Michigan, I specialized in Highway Engineering and Traffic Control. I am licensed to practice Civil Engineering in the Commonwealth of Pennsylvania and am a member of the National Society of Professional Engineers.

3. In 1935, I became Traffic Engineer in the Traffic Survey Bureau of the Detroit Police Department. My work there entailed study and control of traffic flow, parking and related matters. Later, I assumed the duties of Assistant Director of the Detroit Office of the Michigan State Highway Planning Survey. This survey was the first of its kind and was jointly sponsored by the Michigan Highway Department and the United States Bureau of Public Roads. In this capacity I was in direct charge of a parking study of Downtown Detroit and of the compilation and analysis of traffic flow data basic to the design of a limited access thruway system. That study was the basis of the entire design of the road system of Michigan. I later went to Lansing, Michigan to conduct an accident investigation study in conjunction with the Michigan State Police Department, and to direct the compilation and analysis of statewide traffic flow data (sic) for the Michigan State Highway Department. After a brief period of private consulting work in Cincinnati, Ohio I entered the Armed Services. I served as a Commissioned Officer, as Transportation Officer for Engineer Intelligence in the European Theater of Operations. [fol. 45] Prior to D-Day, on loan from the Corps of Engineers to the Theater Provost Marshall's (sic) Office, I conducted a study of military traffic flow and accidents in the United Kingdom. On discharge from the service in 1945, I assumed my present position as Director of the Division of Planning and Transportation for Morris Knowles, Incorporated. In my present capacity, I am responsible for all phases of my company's planning and transportation consulting work which includes highway planning, traffic control, parking studies, land use plans, transportation and circulation plans, urban and rural zoning, redevelopment

and urban renewal and site planning and land development. I am currently engaged in active studies of traffic control and circulation in Erie, Reading, the Lancaster area, Easton, Meadville and a number of Boroughs and Townships. I hold full membership in the American Society of Civil Engineers and am a member of the Executive Committee of the Society's City Planning Division. I also hold membership in the Society of American Military Engineers, the American Institute of Planners and other National Societies.

4. I have studied carefully the Affidavit of Joseph Barnett filed with the Court in connection with the above captioned actions. I have also made a careful field study at first hand of the location and situation of the Highway in Allegheny County, Pennsylvania, known as the Airport Parkway. I have noted the fact that there are few intersecting roads, none of which now carry nor, in my opinion, are likely to develop volumes of traffic which will conflict seriously with the flow of traffic on the stretch of road in question. I believe, therefore, that denial of access from [fol. 46] any or all of the intersecting roads would have little if any effect on the traffic capacity of the Airport Parkway between the intersection of Route 22-30 and the Airport.

5. I have further noted that the 4-lane separated dual road construction now terminates at a cross-road immediately adjacent to the Airport. This makes the generation of traffic on the portion of road in question virtually dependent on the traffic generating capacity of the Airport and terminal operation. I question, aside from possible occasional sporadic peak demands, if this single traffic generator will produce the need for highway capacities of the magnitude of 1500-2000 vehicles per lane per hour on the stretch of road in question, cited by Mr. Barnett in his statement.

6. In my opinion, the statistics contained in Circular Memorandum No. F-2.22 of the United States Department of Commerce, Bureau of Public Roads, dated April 25, 1955, entitled "Accidents Experience on Controlled Access Highways" and the accompanying tables attached to Mr. Bar-

nett's statement, while constituting evidence of a general tendency toward overall benefits in the use of access control on some arterial highways, by no means constitute sufficient and conclusive evidence in support of an application of this generalization to the specific stretch of road in question. I cite the following excerpt from the said Circular Memorandum: "The overall safety benefits of access control are plainly evident from the information already assembled. These benefits *can not be fully evaluated however without much more data than are currently available.*" (Italics supplied.)

[fol. 47] 7. I do not believe that there is any conclusive data to support a theory that a limited access or non-access highway insures safety per se. Although a non-access or limited access highway may reduce accidents per mile in comparison with other types, it does not follow that the total degree of severity will be lessened. There is good reason to believe that due to the increased speed on limited or non-access highways, the proportion of fatal accidents, or serious personal accidents, are greater than on the average highway. The rate of fatal and bad accidents on the Pennsylvania Turnpike, which is a limited access highway, is a source of constant concern—so much so that additional patrol personnel have been authorized from time to time in continuing attempts to reduce excessive speed. The most that can possibly be said in favor of the limited or non-access highways in that regard is that they may decrease the number of small accidents; but, on the other hand, they certainly appear to increase greatly the percentage of bad or fatal accidents.

8. In conclusion, while agreeing with the theory of limited access arterials in principle with the reservation concerning severity of accidents set forth in Paragraph 7 above, I believe that in applying this principle to specific circumstances in which it appears the utility value of existing and potential roadside uses may be substantially inhibited, the traffic flow and accident data must demonstrate conclusively beyond a doubt that overall benefits will accrue in order to justify curtailment of access. It is my conclusion that, with respect to the stretch of road in question, the



sufficiency and concisiveness of traffic flow and accident data made by Mr. Barnett in his Affidavit, and in the tables [fol. 48] attached thereto, are not only questionable generally, because of the admittedly inadequate data, but bear little or no relevance to the particular highway under consideration, the Airport Parkway between the inter-section of Route 22-30 and the Allegheny County Airport.

/s/ J. Cal Callahan

Sworn to and subscribed before me this 22nd day of November, 1955.

/s/ Lottie R. Keys, Notary Public, Pittsburgh, Allegheny Co., Pa. My Commission Expires January 6, 1957.

(Seal)

[fol. 48a] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 49]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

AFFIDAVIT OF DONALD M. McNEIL IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT—Filed December 2, 1955

Commonwealth of Pennsylvania,  
County of Allegheny, ss.:

Before Me, the undersigned authority, personally appeared Donald M. McNeil, who, being duly sworn according to law, deposes and says that:

1. He is a registered professional engineer in the State of Pennsylvania, being a graduate in Civil Engineering from the University of Pittsburgh. His occupation is that of a private consultant specializing in traffic and transportation problems.

2. He is a member of the American Society of Civil Engineering, Past President of the Institute of Traffic Engineers, and Vice-President of the Western Pennsylvania Section of the Professional Engineers Society.

[fol. 50] 3. He was associated with the Bureau of Traffic Planning of the City of Pittsburgh for 26 years, of which 18 years were served as Chief Engineer. He has performed consulting services for the Commonwealth of Pennsylvania and about fifty communities within a radius of 100 miles of the City of Pittsburgh. He is retained by Pittsburgh Railways Company, Yellow Cab Company, and Western Pennsylvania Business Association for special services of an engineering nature.

4. He has read the affidavit of Joseph Barnett filed in this action and agrees with the conclusions therein expressed. He is of the opinion that no competent traffic engineer versed with the problem would conclude otherwise. He believes that the conclusions expressed by Joseph Barnett in said affidavit are applicable to the Airport Parkway in Allegheny County.

5. At the Institute of Traffic Engineers held in Pittsburgh in October, 1955, the problem of highways was discussed. The following extract from the Summary Statement of the Work-Conference on Traffic Problems expresses the unanimous view of the engineers there present:

"To provide for the maximum efficiency of all new major highways, access control is essential in both urban and rural areas. Roadside protection, through the regulation of exits and entrances, must be carried out on all existing traffic arteries in order to recapture and preserve the value of these highways."

6. The Airport Parkway in Allegheny County is four lanes wide (two lanes in each direction) with a medial strip divider. He believes that the road meets all modern designs for highways of limited access character.

7. Saw Mill Run Boulevard in Allegheny County was originally developed as a three lane undivided highway; it has since been increased to four lanes with a medial strip.

[fol. 51] It was originally designed to carry traffic at 50 miles per hour; at the present time it can carry traffic safely at no greater than 35 miles per hour. The reduction in the safe speed of the road, as well as the lessening of its capacity, has resulted, he believes, from the growth of roadside businesses, there being no restriction on ingress and egress. He believes the same thing will happen to the Airport Parkway in a comparatively short time if roadside businesses develop to the point where they are likely to progress if unimpeded by access control.

8. He believes that by 1975 highway traffic in the United States will double in volume, making imperative the need for controlled access highways.

9. In short, he believes that limited access, as compared with unlimited access, highways have the following advantages, all of which would be applicable to the Airport Parkway in Allegheny County:

- (a) They are safer because of the elimination of direct entry, particularly the maneuvering into and out of roadside establishments.
- (b) They preserve their capacity by eliminating the accumulative effects of vehicular movements in the marginal lanes of travel into and out of roadside establishments.
- (c) They promote economical motor vehicle operation by minimizing the number of stops and starts incident to travel through a maze of roadside businesses having direct access.
- (d) They safeguard the existing public investment by insuring that the highways will not quickly become physically and functionally obsolescent.

[fol. 52] (e) They reduce accidents by diminishing traffic hazards.

- (f) They assist in the orderly development of communities by providing transportation arteries that are relatively permanent in character.

/s/ Donald M. McNeil



Sworn to and subscribed before me this 1st day of Dec., 1955.

/s/ Madeline Cowan, Notary Public. My Commission Expires January 27, 1957.

(Seal)

[fol. 52a]

[File endorsement omitted]

Acknowledgment of service (omitted in printing).

[fol. 53]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO AMEND ANSWER AND ORDER  
GRANTING SAME—December 16, 1955

Come Now defendants by their attorney, Leonard M. Mendelson, and move the Court for leave to amend their Answer by deleting the following sentences of Paragraph 4:

"The fourth sentence of paragraph 4 of the complaint is denied in its entirety. Although Defendants have been discussing with the proper officials of the County of Allegheny the advisability and feasibility of the Commonwealth's taking over the said highway and establishing it as a "Limited Access Highway," no decision with respect thereto has yet been reached."

and by substituting in lieu thereof the following:

"Defendants admit that they are about to take over the said Airport Parkway and establish it as a Limited Access Highway."

/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 54]

ORDER—December 16, 1955

And Now, to-wit, this 16 day of December, 1955, the within motion will be and hereby is granted and it is ordered that defendants' Answer be amended as set forth in the within motion.

/s/ Rabe F. Marsh, D.J., /s/ John L. Miller, D.J.

The foregoing is consented to.

/s/ Edward P. Good, Attorney for Plaintiffs.

/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 54a] [File endorsement omitted]

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALDO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHALL and ALICE E. MARSHALL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

**STIPULATION OF COUNSEL—Filed December 19, 1955**

It is hereby stipulated by and between plaintiffs, by their attorneys, Kountz, Fry & Meyer, and defendants, by their attorney, Leonard M. Mendelson, that:

[fol. 57] 1. If the Secretary of Highways declares the Airport Parkway to be a limited access highway, certain members of the plaintiff class, in Civil Action No. 13672, will be denied access to any public or private road now existing, and will have no local service roads to afford them means of ingress and egress from their property.

2. The Commonwealth does not propose to take any land of any members of plaintiff class, but proposes to take a road already in existence.

3. Although the Airport Parkway, if declared to be a limited access highway, will not be the first limited access highway in Pennsylvania, it will be the first instance in which the Commonwealth will have taken over an existing highway, unlimited in its access and declared to be a limited access highway.

4. At the time of the construction of said highway by the County of Allegheny, the County condemned in 1949, by eminent domain, the necessary quantities of land, including, in some instances, land taken from the properties of some of the plaintiffs in the action at No. 13672.

Subject to the defendants' objection that all of the following evidence is irrelevant and immaterial in this action and without waiver on the part of the defendants of [fol. 58] the right to interpose said objection at any appropriate stage of this litigation, the parties agree to the following facts:

5. In making allowance for the damages to the afore-said persons whose land was condemned for the construction of the highway, it was the contention of the County that consideration should be given to the special benefits which it claimed said persons would derive by reason of

having frontage on a new highway and direct ingress and egress thereto and therefrom.\*

6. Before the Board of Viewers at No. 2845 April Term 1949 "A", John K. Creasy, one of the property owners affected by the condemnation, on behalf of his own claim, testified as follows:

"Q. Can you get across the new road at the present time, or will you when the new road is completed from the lower portion to the upper portion?

A. Absolutely not."

7. Mr. Wright, attorney for John K. Creasy, said:

"Mr. Wright: Here is a farmer who had some cattle. Separation of a farm and rendering a portion inaccessible is an element of damage. I don't know whether Duff should decide this question or the Commissioners."

8. Mr. Bair, Attorney for the County of Allegheny, said:

[fol. 59] "Mr. Bair: I don't question that is an element of damage, when a farm is divided into two pieces. As to whether that element might be mitigated by crossing the road from one section to another, Mr. Duff is not in a position to answer that generally."

9. Again, John K. Creasy further testified as follows:

"Q. How do you get to 22 and 30?

A. I have to go seven miles around Beaver Grade Road.

Q. You will be able to go down to where the junk yard is, where they are going to have an interchange?

A. Yes.

Q. How close will that be?

A. It is a mile from my place to the junk yard and 1½ miles back to 22 and 30.

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\* Except as otherwise specifically designated, each of the following paragraphs refers to proceedings before the Viewers or in the Common Pleas Court, with regard to the taking of the land for the construction of the aforesaid highway.



Q. That would be 2½ miles?

A. Yes."

10. Alfred S. Hershberger, a witness called on behalf of the plaintiff, testified as follows on cross examination:

Q. In arriving at your opinion of the value afterwards, were you considering that Mr. Creasy had no access on the new highway at any point on his land? [fol. 60] A. That is a question I wasn't sure of. Even if he had access to it, I placed my value on that upper land for the simple reason I don't see how that man is ever going to get much good out of it. That is going to be a pretty high speed road there coming off Steubenville Pike going west. From a farming standpoint, not much good out of it.

Q. Any good out of it from any other standpoint?

A. He might be able to sell it to someone else for some other reason. I don't know.

Q. It is your opinion that the property up along Steubenville Pike is valuable and it is a high speed highway?

A. Yes.

Q. Why not this?

A. You have cuts and fills; left this property in bad shape.

Q. All along the Steubenville Pike coming up from Thornburg you have hillside and that is used for commercial purposes?

A. Where is that?

Q. Coming up the Steubenville Pike, beginning at that Superior Steel Company there?

A. That is a fine piece of property.

Q. Hillsides along there?

A. Some are no good. The hilly property isn't used.

Q. Certain portions are used, are they not?

[fol. 61] A. I cannot recall where they are.

Q. Isn't it possible that this road leading into a big airport could possibly change the category of this ground and convert it into a bigger and better use than enjoyed before?

A. This particular piece, I wouldn't say that's true.

Q. Generally speaking, a new highway of this type leading to a very large new airport generally changes the category of the land throughout?

A. Yes.

Q. Generally speaking, such a road leading to this airport will help the land?

A. Generally speaking, a wonderful effect.

Q. Benefits a lot of these tracts of land?

A. A lot but not this one.

Q. Why not this one?

A. You have a series of cuts and fills on this property.

Q. Then you did decide in arriving at your opinion of value there is not place along this road where Mr. Creasy can get access?

A. I think he was using it for farm purposes. He would never try to drive a horse across it nor a tractor. If he did, he would get killed.

Q. Assuming there are some accesses and keeping in mind he would be benefitted to some extent, that should be an element which should be taken into consideration here?

[fol. 62] A. No.

Q. Why can't it be taken into consideration if we could assume there are some points where he would have access to the new road?

A. He would have to build a new road up that hill.

Q. He had a hill before?

A. He had a better chance to build a road up there before.

Q. You didn't take that into consideration in this case at all, this road is leading to a new airport and will benefit the property generally?

A. I would say it won't benefit this property.

Q. Where is it more likely for a property to develop, along a new paved highway of this type, or along a red dog type of road like the Scott Station Road?

A. That depends upon the property and for instance when you put one of these roads in what you do to it.

Q. With the exception of this property, you think the road does help generally throughout this area?

A. No, there are some other farms in there you have badly hurt, the farm adjoining this property."

11. West S. Brown, a witness called on behalf of the claimant, testified as follows on cross examination:

"Q. Mr. Brown, do you agree with Mr. Hershberger that a new wide paved road of this type leading to a new modern airport is generally beneficial to the land throughout the area?

[fol. 63] A. Benefits some land, but when cuts and fills run from 25 to 100 feet, I don't see how it is going to benefit this property; cuts on the south side 75 to 100 feet. Right at the road where this private road crosses the property 25 feet on the south side. Right below that two or three of them. How are they going to get access to the upper side of this road? . . . .

Q. In arriving at your opinion of value, were you considering there was no access to the new road from any point on this land?

A. I, don't think there is any point of access.

Q. If access was visible with some adjustment at some point along the new road, would that change your idea of the damage?

A. It might change my opinion, but the upper side of the road it is impossible to get any good out of it. On the lower side, I don't see how it is possible to get on to this highway. I have been all over it. There is no way to get on it."

12. J. C. Gordon, a witness called on behalf of the County of Allegheny, testified as follows on cross examination:

"Q. As an engineer, where would you try to get access to this upper end of the road?

A. By the Socony Vacuum lines, station 32. The road could probably be carried along the top of the cut over to station 32 with the idea of crossing there and coming back to the top of the cut.

[fol. 64] Q. There aren't too many places you could get in?

A. Not too many. Crossing where the cut and fill meet at station 39. There not many places you can cross. It would be rather difficult."

13. Thomas McCaffrey, a witness for the County of Allegheny testified as follows:

"Q. Did you consider the taking of farm machinery across this new high speed highway or making himself a road on both sides of it?

A. Your question involves considerable thought. I considered the property was typed by reason of this highway. The best part of the farm is below his own private road, towards its buildings. Portions of this property absolutely difficult to utilize to physical conditions and so stated by other witnesses. The area through which this highway progresses is through normal low land and both the cuts and fills are going to be difficult. Yet, again, it fronts on the new Airport Parkway, a highway which leads to this new improvement of Allegheny County, and in my judgment a property of this size remaining should sell.

Q. Do you think this property has been benefitted in any special manner which is not common to all of the neighborhood?

A. I do.

Q. In what way would any benefit might accrue to this property different than that enjoyed by other properties?

[fol. 65] A. I think that any property even though subject to cuts and fills would benefit by an improvement of this nature. It was mentioned by Mr. Brown there can't be any more difficult real estate if you follow through the Steubenville Pike, on account of how the cuts were put in. Little businesses crop up.

Q. They didn't crop up on the hillside on the level part?

A. On hillsides too on account of this improvement. Go out Route 30 east and see the conditions. You got to compare land.



Q. I think you are putting a general benefit on this property rather than a special benefit?

A. A general benefit will go to anyone who abuts it.

14. In the Creasy case, testimony was substantially the same before the Court of Common Pleas, as that set forth above before the Board of Viewers.

15. In the Bessie G. Noble case, also No. 2845 April Term 1949 "A", West S. Brown, an expert witness called on behalf of the property owner, Bessie G. Noble, testified before the Viewers on cross examination as follows:

"Q. In arriving at your opinion of value, did you take into consideration that this property would have access on to the new road?

A. I considered it afterwards that it wouldn't have access."

[fol. 66] 16. In the case of Edward K. Nanz and Marcella Nanz, also at No. 2845 April Term 1949 "A", J. C. Jordon, an expert witness called by plaintiff property holders, testified as follows:

"Q. There is a dividing line on the new highway between the north and south traffic?

A. Yes.

Q. A person going from the Nanz property will not be able to go southwardly without going up to one of these interchanges?

A. The present construction calls for the end of the center barrier through there at Station 107.

Q. In other words, you are not going to have a center divisor all the way?

A. Center divisor—stops at station 107. Beyond that the County does not contemplate putting a separator in front of this house. However, the future development of the overpasses, etc., I am unable to say anything about that.

Q. If they carry on the plan further to the south they will have a divisor?

A. That's right.

Q. Where that divisor is?

A. I wouldn't say it is impossible. It is put there for the purpose of separating traffic."

17. West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows on direct examination:

[fol. 67] "Q. Does that ditch in your opinion affect the property after the improvement?

A. Certainly does affect the ingress and egress. Also building this road the ingress and egress have been affected as they can only go one way coming out of the property."

18. Said West S. Brown testified as follows on cross examination:

"Q. Mr. Brown, you said the ditch takes away the ingress and egress. Do you mean to say these people will be prevented from traveling on that private road?

A. The ingress and egress.

Q. You don't mean they cannot get into their house?

A. No, in front of their property.

Q. I believe you stated they can only go one way off this private lane?

A. I mean after this improvement. They can go only one way on this new highway.

Q. Which way?

A. To the north.

Q. Why?

A. Because there will be a big curb in the center there. They can't go over.

Q. Did you hear Mr. Jordon say there was no separator planned in front of this property?

A. It is marked down there. You can see it.

[fol. 68] Q. So if there is no separator here on this property they would be able to go either way?

A. Either way off the lane. After all, my damages are the ingress and egress to their property. The rear end of the property is not affected in my estimate of damages.

Q. So Mr. Jordon is correct about there being no separator in front of this property?

A. I didn't hear him say that. If he said that it is o.k. with me.

Mr. Scanlon:

Q. Before could they get off the old road any place to their property?

A. Yes.

Q. How would they get up the hill outside of this private road?

A. Yes, the private road goes up there. The ingress and egress this property might have after the improvement with that big ditch in front of it—if they filled it in would cost more."

19. Thomas McCaffrey, an expert witness called on behalf of the County, testified on direct examination, as follows:

"A. That old road was paved 18-20 foot surface. The new road is a varied width in front of this property ranging from 100 to 145 feet of right-of-way. My impression is that the new road is an excellent improvement for all properties in this section."

[fol. 69] 20. Said Thomas McCaffrey, on cross examination, testified as follows:

"Q. Do you consider that a property with a ditch in front of a property like this, even though it be on a fine new highway, is as advantageous as an old surfaced road?

A. There would be a ditch.

Q. You heard Mr. Jordon testify that the ditch will not be covered up?

A. Yes.

Q. How deep is that ditch. About 4 feet, isn't it?

A. Four feet as on the plan.

Q. You know there is about 80 feet depth?

A. At that point on the plan—widened out it shows only a fill of one foot.

Q. It prevents people from getting on to the highway except at the lane?

A. There isn't anything new about a condition like— If and when they want to put a pipe in there.

Q. How much do you think it would cost to put a pipe in there?

A. I wouldn't even indicate that.

Q. They couldn't do it for an allowance of \$200.00?

A. But for the purpose of their property they would get at least that much money.

[fol. 70] Q. Do you know anything about the fence?

A. There was a fence taken.

Q. Do you make any allowance?

A. Just as an element.

Q. How much of that \$200.00?

A. As I said, that property would sell for as much with a little adjustment.

Q. No allowance for the fence nor for the ditch?

A. No.

Q. It is not an element of benefit?

A. No but the highway certainly is."

21. In the W. J. Parish case, also at No. 2845 April Term 1949 "A", West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows:

"Q. In your opinion don't you think William J. Parish will be able to use this property the same as before?

A. Not the same as before. Destroyed all the cradles in the rear. The property destroyed. The well which they drilled in there at the rear of the property will be destroyed. You brought a fill so close to the tanks to the gas tanks that I don't think they could use that even if they supported the fill they wouldn't have enough egress and ingress to get around those tanks. [fol. 71] You took 13 feet of ground without the fill and had room to drive in and out. Now the fill in front of these tanks 5 feet and if they built a wall in there down to the west end of the lot they wouldn't have egress and ingress."



22. In the Joseph and Santa Margaret Scaletto case, at No. 2993 January Term, 1950, West S. Brown, an expert witness called on behalf of the plaintiff-property owners, testified on direct examination as follows:

"Q. As it might appear to a buyer how in your opinion has this property been affected by this improvement?"

A. It now sets below the new highway about 15 feet. The old road which traverses north and south in front of this property has been cut off at the north end and instead of having a nice road and outlook from that part of the property there is now a big fill from 10 to 18 feet high, and at the north end there's been a great culvert where the creek had been changed under the highway which is not such a nice outlook as before. Where before the Cliff Mine road met the old highway, now it is about I would say 10 feet higher than the old highway was. The ingress and egress of the property has been affected because south of the property instead of having a hard road you run into the berm of the road which is mud."

Said West S. Brown, in said case, testified as follows on cross examination:

[fol. 72] "Q. Wouldn't you say the new highway is better than the old state road that was there before?"

A. Oh, of course I would say that.

Q. As a result of that wouldn't you say that has increased the value?

A. No, I wouldn't. The road has been cut off within ten feet of that property and the egress and ingress has been cut off and they are now 15 feet below the new highway."

23. In the Jessie A. Dougherty case, at No. 2845 April Term 1949 "A", Alfred S. Hershberger, an expert witness called on behalf of the property owners, testified as follows:

"Q. What outlet does the lower part of the farm have or will have?"

A. As to where?

Q. To any outside public road?

A. Well, if Creasy puts a fence up there now, won't have any outlet.

Q. The only outlet that has been in use is the right-of-way over the Creasy property?

A. That is right.

Q. Aside from it, would you say this lower land is landlocked, this lower tract?

A. I would say if you shut that property off it is landlocked.

Q. No bridge there? A. No.

[fol. 73] Q. No right-of-way across?

A. No sir.

Q. What about the upper tract?

A. That is in bad shape. On the south side of the new road you have a series of cuts and fills. I don't see how you are going to get into it.

Q. Is there any outlet across any abutting property up there?

A. No sir.

Q. You would characterize it as landlocked?

A. Yes sir.

Q. That is entered into your consideration of the \$26,000 damages?

A. Yes sir.

Mr. Bair:

Q. What do you mean by landlocked?

A. As I understand it right now, since you have relocated the private road coming into the Dougherty farm, that does away with any prior right the Dougherties had in the Creasy road by adverse possession. If he put the fence up at that line at the easterly side of the property where he came in to the Dougherty property, that way out will be no more. Now I don't know how you are going to get out of this property. You have a railroad crossing if you go out the Cliff Mine Road and a creek; if you could get across that; a bridge across the Montour Creek would cost a lot of money though.

[fol. 74] Q. Creasy put a fence up there before the taking, didn't he?

A. I don't know who built that fence.

Mr. Donaldson:

Q. Your testimony, Mr. Hershberger, is based upon the assumption that all the ground remaining to the Dougherties is landlocked?

A. Yes sir.

Q. How can you say a piece of ground is landlocked when it lies on a road? I don't care what the fills and cuts are.

A. On this new road?

Q. Yes.

A. I don't see how they are going to go up those cuts and fills to get on that new road.

Q. I still wouldn't call it landlocked."

24. West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows on cross examination:

"Q. In arriving at that opinion of \$15,000, are you considering the land has no access at any point along the new highway?

A. No, I don't think it has any access on the highway. The cuts and fills are big, especially around the building, 77 feet high; down toward the bridge 20 feet high; no access to the property on either side of the road.

[fol. 75] Q. Is it your opinion the property could not be used as a farm after the taking?

A. I don't think the upper part could be used. The lower part might be used as a chicken farm; never used as a large dairy farm as before or as an experimental farm.

Q. Why can't they use it as a dairy farm?

A. Because they don't have enough acreage to take care of 50 cows they had before, 50 cows all the time.

Q. You mean 132 acres wouldn't be enough?

A. 132 would be but there is no way to get ingress or egress either on the north or south."



Said West S. Brown testified as follows on direct examination:

"Q. Mr. Brown, in your opinion does the new Airport Road carry any benefit to the Dougherty property generally or specially?

A. No sir, it does not.

Mr. Donaldson:

Q. Are you also assuming, as was Mr. Hershberger, that you can't get in or out of this property any place?

A. No, I didn't figure that way. You don't have any access on it at all. That small road coming in there, I was on that case before. We had trouble. I am [fol. 76] talking about the people who owned the road, had trouble for 25 years. Now that the County has a new road, it will be much tougher to get in and out of the farm.

Mr. Bair:

Q. Do you think access could be developed at some point along the new road with some adjustment?

A. I don't think so. I don't think it could be developed without a terrific cost.

Q. I was referring to a point at station 60-61. Do you have that in front of you, Mr. Brown?

A. Yes, I got that.

Q. Referring to station 61, I notice a cut, in the center line 3.4 feet, side line 7.4 feet. Wouldn't that indicate there could be an access developed there with some adjustment?

A. I don't think there could be. You only have a small cut there. As you go down over the hill, it gets very, very deep there. I looked that over specially to see if there was any way to get into it. It goes down over a big gulley."

25. In the appeal by Jessie A. Dougherty to the Court of Common Pleas of Allegheny County, at No. 1226 October Term, 1949 "A" from the award of the Board of Viewers, the following statements are contained in the verified Petition filed by Jessie A. Dougherty:

[fol. 77] "By the construction of said road, the acreage not taken was bisected so effectually that neither portion is now accessible to or from the other portion, nor can either portion be used for the other portion or with it.

Further, all access, ingress or egress to or from the unappropriated portions of plaintiff's land has been completely cut off in fact, by the construction of the new road, and plaintiff is left without rights or redress at law or in fact to have or to claim or to obtain a substitute right-of-way, or access to her land from the public road system, to take the place of the right-of-way long enjoyed and appurtenant to her land, until its destruction and obliteration by the said improvement. Plaintiff's unappropriated land is so isolated and surrounded by lands of strangers from whom no way of necessity can be compelled, that it has no practical or market value."

26. In the case of Jessie A. Dougherty v. County of Allegheny, in the Court of Common Pleas, at No. 1226 October Term, 1949 "A", J. C. Jordon, an expert witness called on behalf of the plaintiff property owners, testified as follows:

"Q. Would you say that this road is designed and constructed to facilitate through and speeding traffic to and from the Airport?

A. It is designed for the rapid moving of traffic, complying with the State Code, between the Airport and the City of Pittsburgh. The purpose is to develop as rapid access as possible between the Airport and the City of Pittsburgh.

[fol. 78] Q. With the Airport Parkway as constructed down to 30 and 22, is it planned that this parkway will mean a through traffic highway at that point?

A. At 22 and 30 it joins what is known as the Campbell's Run Road. Campbell's Run Road is to be reconstructed. I am not sure but what the construction has already been advertised. That extends from 22 and 30 to Carnegie. They are also extending the new parkway from Carnegie on down to the Banksville Circle, and to Pittsburgh.

Q. That will go across Greentree, up the hill?

A. Yes. All of that is under plan and some of the work has been advertised. Some is in the progress of preparation. Some hearings have been held before the Public Utility Commission to secure approval.

Q. When the County and State gets through with this over-all plan you will have a through, speedy route from downtown Pittsburgh to the Airport?

A. Yes, that's right.

27. In the said case of *Jessie A. Dougherty v. County of Allegheny*, Alfred S. Hershberger, an expert witness called on behalf of the plaintiff property owners, testified as follows on direct examination:

“Q. This property has been rather thoroughly described by witnesses who have already been on the stand so far as its physical aspects are concerned. What do you have to add to that description?

[fol. 79] A. Well, it was undoubtedly left in a very bad condition. This place here was really a show place before this road went through there. It was a beautiful farm, and a very productive farm, and now it is left with this cliff on the south side along that frontage there. The access to the southern part of the property has been taken away.

Q. You mean the hilly part?

A. The hilly part, for alfalfa land, and of course he pastured the hollows.

Q. Can you get up those hollows now?

A. Not without a lot of difficulty off the new road, and of course it has been left with a bad drainage condition there. Those pipes that stick out over the bottom land, that stick out like canons, that water is going to be confined now and that water is bound to gully up that lower land there. . . .

Q. That upper land, does that have any access on any hard road by which you might be able to get to it?

A. No, that does not.

Q. There is no road coming in the back, or on the sides?

A. There is not, to my knowledge . . . .

Q. Now, suppose this road that Mr. Triggs was discussing were constructed from the bottom land to the highway and from the highway to the top land, do you think it would be feasible to take cattle across that highway to pasture?

[fol. 80] Mr. Mamula: That is a leading question and is improper.

The Court: It is leading. He can say what the change of values has been before and after.

Mr. Wright: I asked him whether it was feasible to take cattle across the highway.

The Court: He may give that as one of the reasons before and after, but you are patting words in his mouth now.

Mr. Wright: I will re-frame the question.

Q. In your opinion is it feasible to take cattle across that new highway?

A. Absolutely not. You might as well try to take them across Baum Boulevard out here."

28. In the charge of the Court in the Jessie A. Dougherty case, the following was said:

"The crossing of the divisor strip on the Airport Parkway, Section 1, is not in violation of any Act of the General Assembly of the Commonwealth of Pennsylvania. (request by defendant)

She also said that the right of access to the house up on this hill was interfered with by the County. That more or less is admitted . . .

She said because of this and because of the fact that access was cut off and because she cannot use this as a cattle farm any further she has been damaged."

[fol. 81] In that said Dougherty trial, the County of Allegheny, through its attorney of record and solicitor and assistant solicitor, filed a motion for new trial containing the following allegations of error. (Printed record, No. 74 March Term, 1952, in the Supreme Court of Pennsylvania at page 90a, Paper books, 370 Pa. 239.):



"1. The Court erred in its charge to the jury in stating that the loss of access to plaintiff's property had been admitted by the County of Allegheny.

2. The Court erred in its charge to the jury in making the prejudicial remark, 'I don't think this farm could be used as a cattle farm any further if it is necessary to take those cattle over that highway.'

3. The Court erred in its charge to the jury in the expression of a personal opinion that 'They (plaintiff) could not take dumb cattle over the highway and they (plaintiff) couldn't take farm equipment over that highway with safety in such a way as would be practical, in my opinion.' (parentheses supplied.)

4. The Court erred in its charge to the jury in making the following prejudicial remark:—'In my opinion, that would be very inconvenient and in my opinion they (plaintiff) would have to have men out there to stop traffic in order to get the cows and farm equipment over there with safety.' (parentheses supplied)"

29. In the Opinion filed by the court in disposing of defendant's Motion for new trial, the following appears:

[fol. 82] "As a result, plaintiff was deprived of access between the lower and upper portions of his farm . . . . .

It is also complained of by the defendant that the Court did not properly instruct the jury in regard to the private road leading through the farm. Defendant complains that the Court in its charge, expressed an opinion that it would be impractical to drive 40 to 50 cattle back and forth across the new highway pasture. The court believes that the woods and fills on both sides of the highway and the drains, and the number of automobiles using same highway make the use of certain roads over this highway impractical. This was purely a matter for the jury to decide and was not an arbitrary statement."

30. In the appeal to the Supreme Court of Pennsylvania in the said Dougherty case, the brief filed on behalf of said Jessie A. Dougherty sets forth the following as one of the questions involved:

"Where a large, active and valuable dairy farm with modern buildings has been bisected by a 120 foot high speed highway, resulting in the loss of 20 acres of land, heavy cuts and fills, the imposition at several places of concentrated drainage, and the destruction of access between its two parts and likewise to the public roads, all of which render it useless for its former purpose, should a moderate verdict obtained at a fair and thorough trial now be set aside on appeal by reason of isolated technical irregularities in the evidence?"

In the said brief, the following appears in the counter history of the case:

[fol. 83] "By this construction, it became impossible to cross the highway with her cattle or farm vehicles at any point. . . . the trial judge himself commented that, although, theoretically, access from the lower to the upper portion of the farm might be obtained by building a farm road across the highway at the westerly portion of the farm, the only place that cuts and fills were small enough for such construction, that such access was not practical for cattle and farm vehicles, and that the upper portion of the farm was entirely isolated by the highway. The private road to the nearby farm from the lower property was cut off by the toe of the fill supporting the Parkway, and the effect of the construction was to leave the upper farm with no access from any direction, and the lower part isolated unless a new private road could be obtained from the adjoining neighbor."

The argument set forth in the said brief contains the following statement:

"It must be apparent, even without the aid of plans and photographs, that the heavy cuts and fills, the

concentration through four large drainage pipes of storm water on the bottom lands in the neighborhood of the buildings, the effective severing of the upper portion from the lower portion thereof, the type of modern high-speed highway construction similar to the Pennsylvania Turnpike, with no traffic lights and no grade intersections, the complete landmarking of the large or upper portion, and the cutting off the private road from the lower portion through the neighboring farm, which had been the only practical access to the entire farm, all of these combined have rendered the farm almost unusable."

[fol. 84] 31. On appeal to the Supreme Court of Pennsylvania, at 74 March Term 1953, the judgment of the lower Court in the said Dougherty case was reversed for reasons here immaterial and a new trial was granted.

In stipulating the truth of the facts hereinabove set forth, all parties involved reserve the right to argue, or to state the objection that any or all of them may be inadmissible because irrelevant or immaterial, or because they are inadmissible for some other legal reason.

Respectfully submitted,

A. E. Kountz, Kountz, Fry & Meyer, Attorneys for Plaintiffs.

Leonard M. Mendelson, Attorney for Defendants.

[fol. 84a]

[File endorsement omitted]

[fol. 85]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

ORDER RE AFFIDAVIT OF LEONARD P. KANE

And Now, upon motion of A. E. Kountz and Kountz, Fry & Meyer, and upon consideration of the consent thereto by Leonard M. Mendelson, It Is Hereby Ordered And Decreed

that the Affidavit of Leonard P. Kane filed heretofore on behalf of Plaintiffs will be admitted to the record as a deposition. The said deposition will be subject to objections by Defendants on the grounds of relevance and materiality, and insofar as the deposition concerns conversations with others under the hearsay rule. It is further ordered and decreed that, if Defendants' Motion for Summary Judgment is dismissed, and a hearing upon the issue is held, Plaintiffs will call Leonard P. Kane to testify, if counsel for Defendants so requests.

/s/ Rabe F. Marsh, D. J., May 29, 1958 nunc pro tunc  
December 19, 1955.

This Order consented to this 19th day of December, 1955.

/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 85a] [File endorsement omitted]

[fol. 85b]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672 (Equitable Action)

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

ORDER DISMISSING MOTION FOR SUMMARY JUDGMENT—  
February 20, 1956

And Now, this 20th day of February, 1956, after argu-  
ment, defendants' Motion for Summary Judgment in the



above captioned action is dismissed. Exception noted to defendants.

/s/ Rabe F. Marsh, By the Court

[fol. 85e] [File endorsement omitted]

[fol. 85d] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 86]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREESEY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHALL and ALICE E. MARSHALL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

**STAY ORDER, ORDER CONTINUING TEMPORARY RESTRAINING ORDER AND DENYING REQUEST FOR INJUNCTION—May 1, 1956**

The plaintiffs in these actions seek to have a statute of the Commonwealth of Pennsylvania (Act of May 29, 1945, P.L. 1108, as amended, 36 Purdon's Pa. Stat. Annot. §2391.1 et seq.) declared violative of the United States Constitution and to have the defendants permanently enjoined from proceeding to act under authority given to them by that statute. Under the statute the defendants are given authority to de-[fol. 87] clare existing highways in the Commonwealth of Pennsylvania limited access highways. The establishment of such limited access highways is, of course, a matter of general and vital interest to the people of Pennsylvania. In this situation and, further, because the court is of the opinion that there is a substantial Federal question involved depending upon the construction given to the statute, this court should await the construction of the statute by the courts of the Commonwealth of Pennsylvania. At the pre-trial conference in December, the court indicated to counsel the advisability of such procedure. The court has been informed that the parties have recently ~~instituted~~ such action in the Common Pleas Court of Dauphin County, Pennsylvania.

In consideration of the foregoing, It Is Now Ordered this 1st day of May, 1956, (1) that all proceedings in this court in these matters be stayed until a definitive construction of the Act of May 29, 1945, P.L. 1108, as amended, 36 Purdon's Pa. Stat. Annot. §2391.1 et seq., by the State courts be had, provided that the parties diligently pursue the remedies in the State courts; (2) that the temporary restraining order heretofore entered on August 1, 1955, in Civil Action No. 13672 be continued in force and effect until further order of this court; (3) that the request of the defendants for an injunction against J. K. Creasy and his wife and George J. Paulos and his wife and the request of the defendants that the plaintiffs be required to file bond are hereby severally denied, without prejudice, however, to the defendants to renew their application in the State proceedings and without prejudice to any of the plaintiffs or de-

endants to seek such further relief in the State courts as they may deem fit and proper.

/s/ Staley, Circuit Judge, /s/ Rabe F. Marsh, District Judge, /s/ John L. Miller, District Judge.

[fol. 87a] [File endorsement omitted]

Proof of service (omitted in printing).

[fol. 88]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, et al., Plaintiffs,

v.

JOSEPH LAWLER, et al., Defendants.

Civil Action No. 13841

JACK C. MARSHALL, et al., Plaintiffs,

v.

JOSEPH LAWLER, et al., Defendants.

PETITION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND  
TO DISMISS COMPLAINT—Filed August 9, 1957

*To the Honorable, The Judges of Said Court: j.*

The petition of Leonard M. Mendelson respectfully represents that:

1. He is attorney for defendants in the above action and is familiar with the matters herein set forth.
2. On August 1, 1955, your Honorable Court entered a Temporary Restraining Order "restraining and enjoining

the defendants from declaring the public highway of approximately five miles in length, extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport, and referred to in the Complaint as 'The Airport Parkway' situate in Allegheny County in said district to be a 'Limited Access Highway,' and restraining and enjoining said Defendants from interfering with direct ingress and [fol. 89] regress to and from Plaintiffs property and said highway, and enjoining said Defendants from enforcing with reference to said highway the Pennsylvania Statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. . . ."

3. On May 1, 1956, this Court, sitting as a three-judge statutory court, as provided by law, entered an Order staying all proceedings in this Court until a definitive construction of the Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391 et seq., by the State Courts be had. The said Order, in addition, continued in force and effect the aforesaid Temporary Restraining Order until further order of this Court.

4. On December 17, 1956, the Court of Common Pleas of Dauphin County, Pennsylvania, entered an Order sustaining preliminary objections to and dismissing a Complaint filed in said Court by J. K. Creasy, William M. McNamee, Frank Ranallo, A. W. Tuicillo, Ed Kleeman and R. G. Cumminsky, Original Plaintiffs, and Charles Sodini, Joseph Sodini, Donald Dawson, Malinda Dawson, Thomas J. Clark, George J. Paulos and Joseph Ranallo, Additional Plaintiffs, against Joseph Lawler, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, Defendants, at No. 2183 Equity Docket and No. 90 C. D. 1956.

5. The Opinion of the Court of Common Pleas of Dauphin County filed in the aforesaid action held that plaintiffs had an adequate remedy at law and were thus not entitled to equitable relief since "all of the plaintiffs' rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391.8 . . .



It is not for this Court to determine whether an abutting [fol. 90] property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages." A true and correct copy of the Opinion and Order of the said Court is attached hereto, made part hereof and marked "Exhibit A."

4. On June 29, 1957, at case No. 28 May Term, 1957, the Supreme Court of Pennsylvania affirmed the aforesaid Order of the Court of Common Pleas of Dauphin County in a Per Curiam Opinion, which adopted the opinion of the lower court.

7. On July 26, 1957, the Supreme Court of Pennsylvania denied plaintiffs' Petition for Re-argument of the case.

8. The continuance in effect of the Temporary Restraining Order entered by this Court on August 1, 1955, is of great detriment to the travelling public, which is being thereby denied the benefits of the limited access highway.

Wherefore, your Petitioner renews the Petition heretofore made and prays your Honorable Court to dissolve the Temporary Restraining Order entered on August 1, 1955, and to dismiss the Complaints filed by the original and all intervening plaintiffs.

/s/ Leonard M. Mendelson, 2330 Grant Building,  
Pittsburgh 19, Pa., Attorney for Defendants.

[fol. 91] *Duly sworn to by Leonard M. Mendelson, 1st  
omitted in printing.*

[fol. 92]

IN THE COURT OF COMMON PLEAS OF  
DAUPHIN COUNTY, PENNA.

EXHIBIT "A" TO PETITION

No. 2183 Equity Docket

No. 90 C. D. 1956

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICILLO, ED KLEEMAN and R. G. CUMMINSKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Original Plaintiffs,

and

CHARLES SODINI, JOSEPH SODINI, DONALD DAWSON, MALINDA  
DAWSON, THOMAS J. CLARK, GEORGE J. PAULOS and JOSEPH  
RANALLO, Additional Plaintiffs,

v.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

OPINION

BY THE COURT:

Plaintiffs have filed a class complaint in equity asking  
the Court to decree that the Act of May 29, 1945, P. L. 1108,  
as amended, 36 P. S. 2391.1 et seq., contravenes and violates  
the Constitution of Pennsylvania and the Constitution of the  
United States. The act in question is the one more familiarly  
known as "The Limited Access Highways Act." The plain-  
tiffs further request that we restrain the Governor of the  
Commonwealth of Pennsylvania and the Secretary of High-  
[fol. 93] ways of the of the Commonwealth of Pennsylvania  
from declaring the highway extending from the intersection  
of Routes 22 and 30 to the Greater Pittsburgh Airport in  
Allegheny County, Pennsylvania, known as the "Airport  
Parkway" to be a limited access highway and from inter-

fering with direct ingress and egress between plaintiffs' property and the said highway, pending hearing of the issue. They also ask that the defendants be forever enjoined from said declaration and said interference.

The defendants have filed preliminary objections to the plaintiffs' complaint in equity. Specifically, those objections are:

1. The complaint fails to state a cause of action.
2. Plaintiffs have an adequate remedy at law.
3. This Court (the Dauphin County Court) is without jurisdiction to grant the relief sought by the plaintiffs.

Exhaustive briefs have been filed by counsel on both sides of the case and detailed argument was held before the Dauphin County Court. The greater part of the argument has been directed to the various constitutional questions raised, and the act itself has been assailed for those reasons. As the complaint indicates, there is at present pending in the United States District Court for the Western District of Pennsylvania an equity suit between the same parties and involving the same issues. That case is listed as CREASY, et al. v. LAWLER, et al., Civil Action No. 13672. The same relief is asked in this last named case as in the case at bar. The District Court has entered a temporary restraining order against the defendants. The suit now before us was instituted because the Federal Judges have been unwilling to render a decision until the statute under attack has been first interpreted by the State Courts.

[fol. 94] The plaintiffs, who claim they are the owners of land and various business properties abutting upon the highway in question, are fearful that their alleged right of ingress and egress will be taken from them without compensating them therefor. They claim that as abutting property owners they have a right of direct access to the presently free-access "Airport Parkway," and that this right is a property right which cannot be taken from them without the payment of just compensation. They allege that if their direct access to the "Airport Parkway" is cut off they will not receive any compensation for the loss of their property.

On the other hand the defendants maintain that the plaintiffs are seeking to have the Dauphin County Court, sitting in equity, substitute itself for the board of viewers which is established by the provisions of the very act itself. In effect, plaintiffs ask this Court to determine whether or not a taking of property has occurred and what damages shall be awarded therefor, and that, if the depriving them of access is found to be a taking of a compensable property right, that plaintiffs' legitimate interests will be constitutionally safeguarded by a resort to viewers proceedings and, if necessary, by later appeals to the courts.

We believe that out of the many questions raised in this case there is only one which this Court is called upon to decide; namely,—Do the plaintiffs have an adequate remedy at law by which they may litigate their right to recover from the Commonwealth any and all of the rights which they claim to be theirs if the present "Airport Parkway" is declared to be a limited access highway? Our answer must be in the affirmative.

The plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation [fol. 95] of authority to support it. At all times the plaintiffs can rely on the provisions of the Constitution of Pennsylvania, Article I, Section 10, that no private property shall be taken or applied to public use "without just compensation being first made or secured." Neither do the plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. The plaintiffs' main attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway *without compensation*. What the property owners here are asking this Court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is *constitutionally* required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of the plaintiffs'



rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391.8.

The Supreme Court of Pennsylvania has made it indisputably clear that a Pennsylvania Court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See *GARDNER v. ALLEGHENY COUNTY*, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the Legislature, in The Limited Access Highways Act, supra, has provided a way in which every property owner may have it decided whether he is entitled to compensation, and, if so, when, for what, and in what amounts. Where the Legislature has provided a way and a remedy, it becomes the exclusive remedy available; *HASTINGS APPEAL*, 374 Pa. 120 (1953); Section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, 46 P. S. 156. For a late case see *JACOBS v. FETZER*, 381 Pa. 262 (1955).

It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the Common Pleas Court and a jury trial, and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, whatever they may be, will be guarded and protected.

There being a full, complete, and adequate remedy at law, of which all plaintiffs can avail themselves, we, therefore, make the following

#### ORDER

AND Now, to wit, December 17, 1956, defendants' preliminary objections to the complaint are hereby sustained, and the said complaint is dismissed at plaintiffs' cost.

/s/ WALTER R. SOHN, J.

[fol. 96a]

[File endorsement omitted]

[fol. 97]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

MOTION FOR PERMANENT INJUNCTION—  
Filed August 9, 1957

*To the Honorable, The Judges of Said Court:*

The plaintiffs by their undersigned counsel, A. E.  
Kountz, Edward P. Good and Kountz, Fry & Meyer, re-  
spectfully move the Court as follows:

1. That on the 1st day of August, 1955, plaintiffs filed  
at the above number their Complaint praying inter alia that  
a permanent injunction issue restraining said defendants,

[fol. 98] and each of them, from declaring the Airport Parkway to be a limited access highway and from interfering with direct ingress and egress to and from plaintiffs' property and said highway, and from enforcing the provisions of the Pennsylvania statute in question.

2. In concise form, the said Complaint and the relevant particulars as to the statute are set forth in the Order entered in this proceeding by your Honorable Court on May 1, 1956, and to which Order the plaintiffs now respectfully refer.

3. By direction or suggestion of this Court, plaintiffs filed their Civil Action in the Court of Common Pleas of Dauphin County, Pennsylvania, at No. 2183 of 1956, Equity Docket, primarily for the purpose of obtaining a "definitive construction" of the aforesaid Pennsylvania statute by the State Courts.

4. Counsel for plaintiffs believe that the direction to seek the interpretation of the State Court was only by reason of the spirit of comity, and that your Honorable Court at that time had and now has complete jurisdiction finally to determine the question without referring it to a State Court.

5. Nevertheless, as hereinabove mentioned, the plaintiffs have sought such construction in the Pennsylvania Court, and as above mentioned, have not been able to obtain it as yet. Attached hereunto and made a part hereof is the [fol. 99] Opinion of the Court of Common Pleas of Dauphin County and its Order both entered December 17, 1956, dismissing the plaintiffs' said Civil Action, or suit, in that Court without any construction or interpretation of the said statute.\*

6. Thereafter from the said Order of December 17, 1956, the plaintiffs took an appeal to the Supreme Court of Pennsylvania, No. 28 May Term, 1957, and after argument thereon the Supreme Court of Pennsylvania on the 28th

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\* Clerk's Note—Opinion printed page 71, supra, not duplicated here.

day of June, 1957, entered an Opinion in the following form:

"PER CURIAM.

FILED: June 28, 1957.

Order affirmed on the opinion of Judge Walter R. Sohn, reported in D. & C."

7. Subsequently in the said Supreme Court of Pennsylvania at said No. 28 May Term, 1957, plaintiffs filed a Petition for Re-Argument, a copy of which is attached hereunto and made a part hereof. To that said Petition an Answer was filed by the defendants denying that a re-argument would be proper in the circumstances, and thereupon the Supreme Court of Pennsylvania on the 26th day of July, 1957, denied said Petition by an Order in the following form:

"Petition denied.

Per Curiam

July 26, 1957"

8. Said litigation in Dauphin County and the Supreme Court of Pennsylvania has covered a period of more than 16 months, and plaintiffs notwithstanding their aforesaid [fol. 100] efforts thus have been unable to obtain the construction of the statute. Plaintiffs thus have exhausted every means of obtaining the construction of the statute by the Pennsylvania Courts, while at the same time not submitting to the destruction of their rights, and property values.

9. Plaintiffs thus have endeavored to follow the direction of this Court to obtain a definitive construction of the Act of May, 29, 1945, P. L. 1108 as amended (36 P. S. Sec. 2391.1 et seq.) by the State Courts; but that the State Courts as aforesaid have declined to construe the Act. The Court of Common Pleas of Dauphin County has refused equitable relief to plaintiffs, as will more fully appear by reference to the said attached copy of the Opinion.

10. That if defendants proceed to bar plaintiffs' access to the said Parkway, and then in course of time, plaintiffs



seek damages from a Board of Viewers and/or from the Court of Common Pleas of Allegheny County; and if damages are awarded, defendants thereupon under the Pennsylvania decisions may retract their order converting the said Parkway to a limited access highway and plaintiffs would be left with irreparable damages, arising out of the depreciation in the value of their properties caused by the uncertainty and in some instances the loss occasioned by the scattering of the good will, business and trade incidental to those of the plaintiffs who operate businesses on their said properties.

[fol. 101] 11. That the valuation of some of plaintiffs' properties abutting the said Parkway has already greatly declined due to uncertainty concerning the intentions of defendants and the legal rights of plaintiffs to compensation in the event that access is denied them, and will further decline in the future by reason of the uncertainty concerning the intention of the defendants and the legal rights of the plaintiffs to compensation.

12. That the Act of Assembly aforesaid under which defendants seek to deprive plaintiffs of access to the said Parkway without payment of compensation therefor, for reasons set forth in plaintiffs' pleadings and by plaintiffs in prior hearings and arguments before this Court, is unconstitutional and invalid.

Wherefore, plaintiffs now renew the application contained in their Complaint and respectfully move your Honorable Court as follows:

1. That it be ordered, adjudged and decreed that the aforesaid Pennsylvania statute of 1945, as amended in 1947, is in contravention and violation of the Constitution of the United States and the 14th amendment thereto.

2. That the said defendants, and each of them, be enjoined from declaring the said highway to be a "Limited Access Highway," and from interfering with direct ingress and egress to and from plaintiffs' property and said highway.

[fol. 102] 3. That the said defendants be restrained and enjoined from enforcing the aforesaid Pennsylvania statute with reference to the said highway.

4. That the plaintiffs be given general relief.

E. P. Good, A. E. Kountz, Kountz, Fry and Meyer,  
Attorneys for Plaintiffs.

[fol. 103] *Duly sworn to by J. K. Creasy, jurat omitted in printing.*

[fol. 104]

ATTACHMENT TO MOTION

IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

No. 28 May Term, 1957

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners  
and lessees similarly situated, Original Plaintiffs, and  
CHARLES SODINI, JOSEPH SODINI, DONALD DAWSON, MA-  
LINDA DAWSON, THOMAS J. CLARK, GEORGE J. PAULOS  
and JOSEPH RANALLO, Additional Plaintiffs, Appellants,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania and GEORGE M. LEADER, Governor  
of the Commonwealth of Pennsylvania, Defendants.

PETITION FOR RE-ARGUMENT

*To the Honorable The Chief Justice and Associate Justices  
of the Supreme Court of Pennsylvania:*

J. K. Creasy, William W. McNamee, Frank Ranallo,  
A. W. Tuicillo, Ed Kleeman and R. G. Cummiskey, on  
behalf of themselves and other property owners and lessees

similarly situated, Original Plaintiffs, and Charles Sodini, Joseph Sodini, Donald Dawson, Malinda Dawson, Thomas J. Clark, George J. Paulos and Joseph Ranallo; Additional Plaintiffs, Appellants in the above captioned ease petition your honorable court as follows:

1. On June 28, 1957, your Honorable Court affirmed the Order of the Court below, dismissing Plaintiffs-Appellants' Complaint in Equity. Your Honorable Court entered an Order *Per Curiam* without opinion affirming on [fol. 105] the Opinion of Judge Walter R. Sohn in the Court below, the Court of Common Pleas of Dauphin County. A copy of Judge Sohn's opinion is attached hereto.

2. Your petitioners brought this action in the Court of Common Pleas of Dauphin County upon the order of the District Court of the United States for the Western District of Pennsylvania. Plaintiffs originally began an action against defendants in the District Court and were there awarded a temporary restraining order. The District Court then while retaining jurisdiction required plaintiffs to initiate an action in equity in the Court of Common Pleas of Dauphin County, the State action was brought in order that the Courts of the Commonwealth might interpret the statute which Plaintiffs challenged on constitutional grounds, namely, the Act of Assembly of May 29, 1945, P. L. 1108 as amended, 36 P. S. 2391.1 et seq.

3. The Court below did not construe or interpret the statute in question; it stated only that Plaintiffs should wait until Defendants have acted under the authority of the statute and then they may test their remedy at law. Neither the Court below nor this Honorable Court has answered the questions raised concerning the constitutionality of this statute.

4. Appellants and, probably, Appellees desire that the rights of owners adjacent to highways which are declared to be limited access roads be defined as soon as may be. As Appellants earlier indicated in their brief they will suffer irreparable damages if Appellees proceed to bar their access to the Allegheny County Airport Parkway before Appel- [fol. 106] lees right so to do without payment of compensa-

tion is clearly established. If the highway is converted to a limited access road and subsequently it is determined that the right of access is a compensable right the conversion of the highway may be retracted leaving Appellants, with great damages and no claim for compensation.

5. Appellees have indicated that they intend to act under this statute, to convert other roads in the Commonwealth besides the Allegheny County Airport Parkway to limited access highways. While the property rights of adjacent owners remain as undefined as they are at present, it is impossible for Appellees to proceed because the expense involved in converting a highway to a limited access highway cannot even be estimated in advance.

6. The conclusion of the Court below that an injunction will not lie to prevent the conversion of this highway to a limited access highway is contrary to precedent. There are other serious Federal constitutional questions which have been raised and which the Court below did not answer.

Wherefore, your petitioners request that this Honorable Court allow re-argument in order that counsel again may present these constitutional questions to your Honorable Court for its consideration.

[fol. 106a] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 107]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Common-  
wealth of Pennsylvania, and GEORGE M. LEADER, Gov-  
ernor of the Commonwealth of Pennsylvania, Defen-  
dants.



## Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

ANSWER TO PETITION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS COMPLAINT FILED AUGUST 9, 1957-  
Filed August 20, 1957

Plaintiffs are informed that a petition is outside of the Federal Rules of Civil Procedure, but nevertheless from an abundance of caution they are answering the petition so that nobody could infer a default.

Answering said petition of the defendants filed the 9th day of August, 1957, the plaintiffs say:

[fol. 108] 1. That the factual matters set forth in paragraphs 1 to 8 of said petition are not denied; various of the conclusions of law are denied.

2. Plaintiffs deny that the restraining order should be dissolved and deny that the complaints should be dismissed. They are advised by counsel and believe that on the contrary the complaints and the answers thereto should be heard finally by your Honorable Court, and that your Honorable Court should thereupon grant the relief prayed for in the complaints and the relief prayed for in the motion for permanent injunction filed by the plaintiffs in these proceedings on the 9th day of August, 1957.

3. All of the averments set forth in the complaints filed by the plaintiffs herein, and all of the averments set forth in the said motion of the plaintiffs filed August 9, 1957, are hereby repeated, and by such reference are now made part of this answer.

Wherefore, plaintiffs respectfully pray that the aforesaid petition of the defendants filed August 9, 1957, be dismissed.

/s/ A. E. Kountz, Kountz, Fry & Meyer, Attorneys  
for Plaintiffs.

[fol. 108a] *Duly sworn to by J. K. Creasy, jurat omitted in printing.*

[fol. 108b] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 109]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION OF COUNSEL RE AFFIDAVITS OF DONALD M.  
MCNEIL AND JOSEPH BARNETT AND ORDER THEREON—  
Filed September 26, 1957.

It is hereby stipulated and agreed by and between counsel for plaintiffs and counsel for defendants that the Affidavits of Donald M. McNeil and Joseph Barnett, heretofore filed in support of defendants' Motion for Summary Judgment, shall be admitted to the record as depositions.

/s/ Kountz, Fry & Meyer, by Edward P. Good, Attorneys for Plaintiffs.

Richard B. Tucker, Jr., Patterson, Crawford, Arensberg & Dunn, Attorneys for Fisher Oil Co.

Mayer Sniderman, Attorney for Jos. Adams et al.

Leonard M. Mendelson, Attorney for Defendants.

[fol. 110]

ORDER OF COURT

And now, to wit, this 30<sup>th</sup> day of September, 1957, upon consideration of the foregoing stipulation, the same is hereby approved and ordered filed, and the Affidavits of Donald M. McNeil and Joseph Barnett, heretofore filed in support of defendants' Motion for Summary Judgment, are hereby admitted to the record as depositions.

/s/ Rabe F. Marsh, D. J.

[fol. 111]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ORDER OF COURT RE SUBSTITUTION OF PARTY—  
October 11, 1957

And Now, the 11 day of October, 1957, the court having been informed that on October 1, 1957, Louis M. Stevens became Secretary of Highways of the Commonwealth of Pennsylvania, succeeding Joseph Lawler, upon the motion of counsel for plaintiffs and of Leonard Mendelson, attorney for the named defendants and for Louis M. Stevens, successor of Joseph Lawler as Secretary of Highway of the Commonwealth of Pennsylvania, It Is Ordered that the caption and record herein be amended by adding as a defendant, "LOUIS M. STEVENS, SUCCESSOR TO JOSEPH LAWLER, as Secretary of Highways of the Commonwealth of Pennsylvania."

/s/ Rabe F. Marsh, D. J.

[fol. 111a]

[File endorsement omitted]

[fol. 112]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICCHIO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

VS.

LEWIS M. STEVENS, Secretary of Highways of the Common-  
wealth of Pennsylvania, and GEORGE M. LEADER,  
Governor of the Commonwealth of Pennsylvania, De-  
fendants.

## Civil Action No. 13841

JACK C. MARSHALL and ALICE E. MARSHALL, Plaintiffs,

vs.

LEWIS M. STEVENS, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Before: Staley, Circuit Judge, Marsh, District Judge, Miller, District Judge.

Opinion and Order—March 19, 1958

OPINION

Marsh, District Judge.

The plaintiffs in these actions before a statutory court<sup>1</sup> seek to have a statute of the Commonwealth of Pennsylvania, Act of 1945, May 29, P. L. 1108, §1 et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq. (hereinafter referred to as "statute"), as applied to them, declared violative of the Constitution of the United States, and to have the defendants, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania, permanently enjoined from enforcing said statute. We think they are so entitled.

[fol. 113] Most of the important facts have been stipulated.<sup>2</sup> The plaintiffs are owners or tenants of land in Allegheny County, Pennsylvania, abutting a public highway known as the "Airport Parkway" (hereinafter referred to as "parkway"), which highway extends from U. S. Routes 22-30, with which it intersects, to the Greater Pittsburgh Airport in said county.

<sup>1</sup> Convened pursuant to Title 28 U.S.C. §§2281, 2284.

<sup>2</sup> Stipulation of counsel filed December 19, 1955; defendants' waiver of objections to plaintiffs' findings of fact; see transcript of hearing March 22, 1956, pages 68 et seq. (sic)



Under the statute, the Secretary of Highways of Pennsylvania, with the approval of the Governor of Pennsylvania, is empowered to take over existing highways in the Commonwealth of Pennsylvania and to declare any such highway a "limited access highway" which is defined by the statute as a "... public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. . . .", 36 Purdon's Pa. Stat. Ann. §2391.1. Section 8 of the statute, 36 Purdon's Pa. Stat. Ann. §2391.8, provides that "... the owner or owners of private property affected by the . . . designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken . . ."

The defendants admit that were it not for the restraining order and a subsequent preliminary injunction granted by this court, the parkway would have been taken over as a state highway and designated a "limited access highway" under the statute. In that event, which would be the first instance in Pennsylvania where an existing highway has [fol. 114] been designated a limited access highway under the statute, all of the plaintiffs will be denied direct access to the parkway from their land. Certain of the plaintiffs will have no means of access on any public highway, and in effect their property will be land-locked and completely inaccessible for most purposes. In declaring the parkway a limited access highway, under the authority of the statute, the Commonwealth would not take any land or improvements presently owned or leased by the plaintiffs.

Plaintiffs assert that §8 of the statute, under the present decisional law of the Supreme Court of Pennsylvania, denies them compensation for any deprivation of access not accompanied by an actual physical taking of land, and in that event they would be deprived of property without due process of law as guaranteed them by the Fourteenth Amendment of the United States Constitution.

Initially, the instant proceedings were stayed because we were of the opinion that whether a substantial federal

question was involved depended on the construction given the statute, and, further, we were unwilling to resolve that issue until the courts of the Commonwealth of Pennsylvania first had an opportunity to construe the statute in respect to the matter here in controversy.

Accordingly, the plaintiffs filed an action in equity against the defendants in the Court of Common Pleas of Dauphin County, Pennsylvania, requesting relief identical to that sought here.

Upon preliminary objections of the defendants, the Dauphin County Court dismissed the plaintiffs' complaint, holding that under §8 of the statute, the plaintiffs were [fol. 115] afforded an adequate remedy at law to test their right to damages, if any, before a board of viewers. It specifically refrained from adjudicating the pivotal issue of whether or not plaintiffs could recover damages in such proceedings. On appeal, the Supreme Court of Pennsylvania affirmed the decision of the lower court.<sup>3</sup>

Subsequently, the plaintiffs filed a motion here for a permanent injunction enjoining the defendants from enforcing the statute, and on the same date, the defendants moved to dissolve the preliminary injunction and to dismiss the complaint, which matters are presently before the court for decision.

Some of the plaintiffs have established on their land certain businesses, i.e., service stations, restaurants, and an amusement park. Other properties are presently occupied as residences or farms, but because of the advantage of direct access to the parkway, possess great value as potential commercial sites.

At the time these proceedings were instituted and at the present time, the parkway is the principal thoroughfare for vehicular travel between the City of Pittsburgh, Pennsylvania, and the Greater Pittsburgh Airport, and a vast number of vehicles daily pass the properties of the plaintiffs. The success of all the businesses now in existence and those contemplated by the plaintiffs, or their

<sup>3</sup> Creasy v. Lawler, 389 Pa. 635, 133 A. 2d 178 (1957), in which the opinion of the Dauphin County Court is quoted verbatim and adopted per curiam.

prospective assigns, depends almost entirely on the continued enjoyment of access to the parkway.

In the past, some of the plaintiffs had been carrying on negotiations to either sell or lease their land for very attractive prices, but the negotiations were broken off by [fol. 116] the interested parties because of the publicity connected with the plans of the Commonwealth to designate the parkway a limited access highway.

It is impossible at this time to ascertain with any degree of certainty the extent or degree of damage that would be incurred by the individual plaintiffs because of the deprivation of access involved; however, it would appear from convincing testimony introduced by the plaintiffs that the properties as a whole would depreciate in value in an amount in excess of one million dollars.

The parkway is presently maintained by the County of Allegheny, having been constructed by it in 1949 after it condemned, through the exercise of its power of eminent domain, the necessary quantities of land for the right-of-way. In some instances, part of the land owned or leased by the plaintiffs was "taken". In accordance with the established law in Pennsylvania,<sup>4</sup> the Board of Viewers when assessing damages to the property owners for their land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new parkway and the access thereto.<sup>5</sup>

### *Jurisdiction*

Federal jurisdiction in these cases is based on the plaintiffs' allegation of a substantial federal question, to-wit, [fol. 117] that the "Pennsylvania Limited-Access Highway

<sup>4</sup> Cf. *In Re Appointment of Viewers, etc.*, 344 Pa. 5, 23 A. 2d 880, 881 (1942); see also "State Highway Law" of Pa., Act of 1945, June 1, P. L. 1242, Art. III, §303, 36 Purdon's Pa. Stat. Ann. §670-303, with regard to the present procedure in assessing damages for land taken for state highways.

<sup>5</sup> The defendants contend that the Viewers also considered the possibility of the parkway being subsequently designated a limited access road because the statute was then in effect. The evidence in this respect was not convincing.

Act" as applied to them is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del., L. & W. R.R. v. Morristown*, 276 U. S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law §646.

Each of the plaintiffs proved that if the parkway were designated limited-access, he would suffer damages in excess of the requisite jurisdictional amount,<sup>6</sup> and in the Marshall case, there is the additional allegation of diversity of citizenship.

Both cases were consolidated for hearing, and as required by 28 U.S.C. §2281 were heard by a three-judge court. The defendants concede that this court has jurisdiction;<sup>7</sup> however, relying on the authority of *City of El Paso, et al. v. Texas Cities Gas Co.*, 100 F. 2d 501, 503 (5th Cir. 1938), *cert. den.* 306 U. S. 650, *reh. den.* 306 U. S. 669, and *Alabama Public Service Commission et al. v. Southern Railway Co.*, 341 U. S. 341 (1951), contend that we should not exercise our jurisdiction and grant the extraordinary relief requested because of the disinclination of the federal courts to interfere in state matters before remedies afforded by the state have been exhausted, and, especially so, where the State Courts have not yet rendered

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<sup>6</sup> The defendants not only do not seriously contest that each plaintiff would suffer damages in excess of \$3,000, the jurisdictional amount, but in effect so stipulated as to the original plaintiffs by advising the court that they had no objection to the plaintiffs' "Request for Findings of Fact" No. 3 (T. 3/22/56, p. 68); and as to the intervening plaintiffs, the defendants were willing to so stipulate if this court had granted the defendants' petition for an injunction they had requested during the proceedings, enjoining certain of the plaintiffs from effecting a change in the local zoning laws or improving their properties pending the outcome of these actions (T. 3/22/56, p. 122).

<sup>7</sup> See defendants' brief filed November 18, 1955, p. 4. Any doubt as to whether the Federal Courts have jurisdiction to determine the constitutional validity of a state statute not yet construed by the State Courts has been dispelled by the Supreme Court of the United States in *Doud v. Hodge*, 350 U.S. 485.



a clear or definitive decision as to the meaning of the statute.

[fol. 118] In *Alabama Public Service Comm. et al. v. Southern Railway Co.*, *supra*, the Supreme Court of the United States, although assuming it had jurisdiction, refused to exercise it to examine the constitutionality of an order of the Alabama Public Service Commission denying a permit to the plaintiff to discontinue certain intrastate trains on the ground that they were being operated at a loss. The plaintiff under Alabama law had the right prior to instituting the action in the federal court to have the order reviewed by the state courts but chose not to do so. The Supreme Court declined to exercise jurisdiction as a matter of sound equitable discretion because of comity and because it concluded that the court's intervention was not required to protect the plaintiff's constitutional rights.

Likewise in *City of El Paso et al. v. Texas Cities Gas Co.*, *supra*, the United States Court of Appeals for the Fifth Circuit reversed the granting of a preliminary injunction to enjoin the enforcement of a city ordinance where the plaintiff had not taken an appeal provided by state statute.

We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined, and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer v. Wistell et al.*, 334 U. S. 385 (1948).

[fol. 119] If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all likelihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses dependent on the continued right of access would be deprived of an opportunity to realize a successful completion (sic) of the negotiations.

Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer v. Witsell*, *supra*, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities, §9 of the statute, 36 Purdon's Pa. Stat. Ann. §2391.9.

[fol. 120] *Eminent Domain or Police Power*

The plaintiffs contend that if the parkway is declared a limited-access highway by the defendants in accordance with the authority vested in them by the statute, the resultant total destruction of their right of access to the parkway amounts to a "taking" under the Commonwealth's power of eminent domain, thereby imposing a duty on the Commonwealth to pay them compensation.

On the other hand the defendants contend that the statute is a valid and legitimate exercise of the Commonwealth's police power, and even though property rights of the plaintiffs may be destroyed by the application of the statute, there is no duty imposed on the Commonwealth under the Fourteenth Amendment of the Constitution to pay compensation to the plaintiffs.

The power of eminent domain and the police power have been defined and contrasted by the Supreme Court of Pennsylvania in *Appeal of White*, 287 Pa. 259, 134 Atl. 409, 411 (1926), as follows:

“‘Police power’ should not be confused with that of eminent domain. Police power controls the use of property by the owner, for the public good, its use otherwise being harmful; while ‘eminent domain’ and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed.”

[fol. 121] See also, *C. B. & Q. Railway v. Drainage Comm'rs.*, 200 U. S. 561 (1906); *New Orleans Public Service v. New Orleans*, 281 U. S. 682 (1930).

Though property may be regulated to a certain extent under the police power, if the regulation goes too far, it will be recognized as a taking. *Penna. Coal Co. v. Mahon*, 260 U. S. 393 (1922).

The ultimate decision as to proper exercise of the police power rests with the courts, and, if the exercise goes too far, there is a judicial duty to investigate and declare the exercise of the police power invalid. *Appeal of White, supra*.

In *Penna. Coal Co. v. Mahon, supra*, at pages 415-416, Mr. Justice Holmes, speaking for the court, had the following to say about the police power of the Commonwealth of Pennsylvania unconstitutionally exercised by it under the “Kohler” Act which forbade the mining of coal in such a way as to cause the subsidence of dwellings:

“The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hirston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency

of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions."

[fol. 122] See also, *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, 36 (1951).

The defendants cannot successfully maintain that the plaintiffs would not be deprived of property rights by the change of the parkway into a limited-access highway.

The right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation. 29 C.J.S. Eminent Domain, §105; 18 Am. Jur., Eminent Domain §§158, 183, and cases cited thereunder.

The Pennsylvania courts have also recognized it as a property right. *Breinig et ux. v. Allegheny County, et al., Appellants*, 332 Pa. 474, 2 A. 2d 842 (1938); and *Lang v. Smith*, 113 Pa. Super. 559, 173 Atl. 682, 683 (1934), wherein the court said:

"That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized. . . ."

In *Donovan v. Pennsylvania Co.*, 159 U. S. 279, 301-302 (1905), the Supreme Court of the United States, discussing the rights of abutting property owners, stated as follows:

"... The right may be regarded in the nature of an incorporeal hereditament.' . . . The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate



public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

[fol. 123]. We agree that the construction and designation of limited-access highways is a proper subject of police regulation and legislation by the Commonwealth insofar as it relates to the welfare and safety of the public; however, we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such.

Most authorities on limited-access highways recognize that where an established "land-service" road, as is the parkway presently, in which the normal right of access has already come into being, is converted into a limited-access highway in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation exactly as they would be if such rights were destroyed by any other type of construction. See: "Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street", 43 A.L.R. 2d 1072, §3, p. 1074; 18 Am. Jur., Eminent Domain §§183, 184, 185 and cases cited thereunder. See also, the following articles; *Clark, The Limited Access Highway*, 27 Wash. L. R. 111, 121 (1952); *Cunningham, The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. R. 19 (1948); and *Freeways and the Rights of Abutting Owners*, 3 Stanford L. R. 298 (1951). The Supreme Court of Wisconsin in the recent case of *Charles Carazalla v. State of Wisconsin et al.*, 269 Wis. 593, 71 N. W. 2d 276 (1955), recognizing those articles as authoritative, referred to them as follows:

"The authors of all three articles agree that the limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid out or relocated highway, where no prior right of access existed on the part of abutting land owners, such

abutting land owners are not entitled to compensation. On the other hand, the authorities cited in these articles hold that where an existing highway is converted into a limited-access highway with a complete [fol. 124] blocking of all access from the land of the abutting owner, there results the taking of the pre-existing easement of access for which compensation must be made through eminent domain . . ." (emphasis ours)

These articles are also referred to as "instructive discussions" on the subject by the Supreme Court of Missouri in *State v. Clevenger*, 365 Mo. 970, 291 S. W. 2d 57 (1956).

Nor can the defendants successfully maintain that no taking would be involved in the deprivation of plaintiffs' access to the parkway merely because the defendants do not contemplate the destruction or physical appropriation of the plaintiffs' land. Cf. *United States v. Causby*, 328 U. S. 256 (1946); *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955).

The Supreme Court of Pennsylvania discussed the development of the law with regard to when a "taking" has occurred in *Miller v. City of Beaver Falls*, *supra*, as follows:

" . . . The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation" . . .

"... The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.* We do not propose that our Federal or [fol. 125] State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest."

Therefore, we conclude that the proposed deprivation of the plaintiffs' access to the parkway would constitute a taking of property in the constitutional sense under the Commonwealth's power of eminent domain for which compensation must be paid to plaintiffs.

DOES THE STATUTE CONFORM WITH THE DUE PROCESS PROVISIONS OF THE FEDERAL CONSTITUTION INsofar AS IT IS AN EXERCISE OF THE COMMONWEALTH'S POWER OF EMINENT DOMAIN?

It is an arresting feature in the case at bar that while plaintiffs are most apprehensive that §8 of the statute may be construed to deny to them compensation for loss of access since none of their land will be taken, the defendants vigorously contend that such was the intention of the Pennsylvania Legislature, and that if plaintiffs are relegated to their remedy at law, the Pennsylvania Supreme Court will so hold. Moreover, the defendants frankly assert that they would also urge this construction of the statute on the Pennsylvania Courts.\* Both sides have presented persuasive argument and Pennsylvania decisions to support this interpretation.

But defendants contend that the statute is constitutionally sound because §8 thereof provides plaintiffs with an opportunity to test their right to compensation in the State Courts beginning with a board of viewers. [fol. 126] Plaintiffs contend that we should examine this

\* Transcript of hearing (11/18/57), p. 41; see also, *id.*, pp. 4, 31, and transcript of hearing (2/12/57), pp. 8-9.

statute and determine whether or not it provides them with a certain and reasonably prompt right to compensation for loss of access where there is no taking of their land. They argue that if it does not, the statute, *inter alia*, is violative of due process under the Fourteenth Amendment. They earnestly urge upon us that if the statute is unconstitutional, it would be highly inequitable to compel them to pursue a remedy at law in the State Courts, only to have it judicially determined that plaintiffs cannot recover compensation under the statute,—the very result which plaintiffs fear and of which defendants are convinced.

Without venturing to predict the ultimate decision of the Pennsylvania Courts on the issue of compensation, we think in these circumstances it is our duty now to examine §8 of the statute, construe it in the light of the pertinent Pennsylvania Supreme Court decisions, and determine whether as an exercise of the Commonwealth's power of eminent domain, it conforms with the due process requirements of the Fourteenth Amendment with respect to the deprivation of plaintiffs' right of access to the parkway.

We begin with general principles.

"As a general rule, the exercise of the power of eminent domain that is, the taking of private property for public use, is subject to the constitutional right of the owner of the property taken to just compensation, regardless of the manner in which the property is appropriated, or whether it is used for the purposes for which it is taken." 29 C.J.S. Eminent Domain §97; see also, 12 Am. Jur. Constitutional Law §658.

[fol. 127] "The constitutional guaranty as to just compensation for property taken for public use is paramount to any statute, and a statute not in keeping with such guaranty is unconstitutional." 29 C.J.S. Eminent Domain §98.

"A statute authorizing an exercise of the power of eminent domain is inoperative and will not support condemnation proceedings *unless it provides for certain and reasonably prompt compensation to the owner of the property taken . . .*" 29 C.J.S. Eminent Domain §99. (emphasis supplied)



"While the manner in which payment is to be made is ordinarily within the province of legislative discretion, the method of compensation prescribed must be such as to preserve inviolate to the owner absolute assurance of compensation before he is required to surrender possession of his property." 29 C.J.S. Eminent Domain §99. (emphasis supplied)

In §8 it is provided that owners of private property such as plaintiffs "... shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken ..." If the Legislature meant to identify or equate the term "property" with "land", it seems quite clear that it intended to deprive the plaintiffs of compensation for the loss of the incorporeal property right of ingress or egress to, from or across a limited-access highway.

We have referred to the Pennsylvania Legislative Journal for help in determining precisely what the Pennsylvania Legislature intended when it provided that the Commonwealth would not be liable for consequential damages "where no property is taken" in the designation of an existing highway as a limited-access highway, but we find [fol. 128] the journal devoid of all discussion or information in this regard.\*

Decisions of the Pennsylvania Supreme Court dealing with the liability of the Commonwealth for damages in road cases have denied compensation for damages which occur where there is less than the actual and physical taking of land or ground for the construction or improvement of a highway.

In *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 Atl. 309, 310 (1932), where no land was taken, the Supreme Court of Pennsylvania denied compensation for the impairment of access and deprivation of light sustained by the plaintiff as the result of the erection of a bridge by the Commonwealth in the center and within the boundary lines of a street on which the plaintiff's property abutted.

\* See Vols. III and IV, Pa. Legislative Journal, 1945.

In *Brewer et ux., appellants v. Commonwealth*, 345 Pa. 144, 27 A. 2d 53 (1942), the Pennsylvania Supreme Court denied a plaintiff whose land abutted a highway compensation for damages sustained as the result of a change of grade where no land belonging to the plaintiff was physically taken.

In *Heil v. Allegheny County*, 330 Pa. 449, 199 Atl. 341 (1938), a state highway on which plaintiff's land abutted was relocated, but since none of the plaintiff's land was taken or seized in the relocation, he was denied damages resulting from the diminution of the value of his land resulting from the diversion of the traffic.

The theory in the earlier decisions was again given support in the case of *Koontz v. Commonwealth*, 364 Pa. 145, 70 A. 2d 308, 309 (1950), where the Supreme Court of Pennsylvania said:

[fol. 129] "It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law . . . for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land . . ." (emphasis supplied)

In a more recent decision of the Superior Court of Pennsylvania, *Moyer v. Commonwealth*, 183 Pa. Super. 333, 132 A. 2d 902 (1957), the court specifically held that the impairment of a landowner's ingress and egress to a highway resulting from its relocation 30 feet away, and the building of fill in front of the landowner's property, without the taking of land, was not compensable under the Pennsylvania "State Highway Law".<sup>10</sup>

Interpreting the statute in the light of the foregoing cases,<sup>11</sup> we conclude that the Pennsylvania Legislature did

<sup>10</sup> *Supra*, f.n. 4.

<sup>11</sup> It would necessarily follow from the decision in *Doutt v. Hodge*, *supra*, at p. 487, that in the absence of a construction of a state statute by the State Courts, this court may construe the statute in order to determine its federal constitutionality. Cf. *Versluis v. Town of Haskell, Okla.*, 154 F. 2d 935 (10th Cir. 1946); *Virginia Surety Co. v. Knoxville Transit Lines*, 135 F. Supp. 606 (E.D. Tenn. 1955); *Day v. North Am. Rayon Corp.*, 140 F. Supp. 490 (E.D. Tenn. 1956).

not intend to compensate those abutting land owners whose land is not physically taken, but whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway.<sup>12</sup> For that reason, we think the statute is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We are especially persuaded to this conclusion by the fact that §8 of the statute provides that damages for the taking of property for limited-access highways in town-[fol. 130] ships and boroughs, as here, shall be paid in the same manner as now provided by law, to-wit, the "State Highway Law". That law, as construed by *Koontz v. Commonwealth*, *supra*, and *Moyer v. Commonwealth*, *supra*, does not impose liability on the Commonwealth for damages where no land is taken.<sup>13</sup>

Moreover, we have found no other general law of Pennsylvania which, under accepted principles,<sup>14</sup> could be read in conjunction with the present statute so as to make the payment of compensation to the plaintiffs possible.

The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a "severability clause" (§15, 36 Purdon's Pa. Stat. Ann.,

---

<sup>12</sup> Cf. the Pennsylvania "Statutory Construction Act", 1937, May 28, P.L. 1019, art. I, §1 et seq., as amended, 46 Purdon's Pa. Stat. Ann. §501 et seq., especially §§551, 552(4) with regard to ascertaining the intent of the Legislature in the enactment of a law.

<sup>13</sup> The federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state. *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U. S. 165 (1934); *Burns Mortgage Co. v. Fried*, 292 U. S. 487 (1934); *Hartford Accident & Indemnity Co. v. Nelson Co.*, 291 U. S. 352 (1934); *United States ex rel. Touhy v. Ragen*, 224 F. 2d 611 (7th Cir. 1955), *cert. den.* 350 U. S. 983; *McClaskey v. Harbison-Walker Refractories Co.*, 138 F. 2d 493 (3d Cir. 1943).

<sup>14</sup> Cf. *In re Sharett's Road*, 8 Pa. 89 (1848); see also cases cited in 29 C.J.S. Eminent Domain §99, f.n. 96.

§2391.15).<sup>15</sup> However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account.

[fol. 131] *Six Per Cent Argument*

To bolster their argument that the plaintiffs are not entitled to any compensation from the Commonwealth for the taking of their right of access to the parkway, the defendants advance a further interesting theory to the effect that historically in Pennsylvania the land taken for roads and highways is regarded a little differently than land taken for other public uses because in the original grants or patents from the Commonwealth, there were contained reservations to the Commonwealth of 6 acres out of every 100 acres for roads, and the Legislature may so use the land reserved without paying the value of it to the grantee, his heirs or assigns. See *Plank-Road Company v. Thomas*, 20 Pa. 91, 93 (1852); *Workman v. Mifflin*, 30 Pa. 362 (1858); *Township of East Union v. Comrey*, 100 Pa. 362 (1882); *Herringtons' Petition*, 266 Pa. 88, 109 Atl. 791 (1929). See also, 35 Dick. L. R. 192 (1931) for an interesting historical discussion of this rule.

Though the defendants' argument appears plausible, we cannot subscribe to it as sufficient cause for holding that these plaintiffs are not entitled to any compensation for the taking of their existing right of access to the parkway.

We cannot believe that the original grantors ever envisaged limited-access highways, but rather were concerned equally with the construction of roads for the benefit of the land owners as well as the public using the road. We believe this sentiment is expressed in an early case alluding to the rule, *McClenachan v. Curwin*, 3 Yeates (Pa.) 362 (1802), where the court said at pages 372-373:

<sup>15</sup> Even if the statute did not contain a severability clause, the Pennsylvania Statutory Construction Act, §55, 46 Purdon's Pa. Stat. Ann. §555, which provides for severability generally in any statute would apply.



[fol. 132] "Although in this early arrangement, there might be a chance that certain purchasers might be obliged to contribute more than the 6% to the roads, yet it might possibly have been foreseen, that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements."

The so-called "Six Per Cent Rule", when closely scrutinized, is essentially based on a contractual relationship, the plaintiffs' original predecessors in title having received, in the form of the additional 6 acres, consideration for the right of the Commonwealth to later use the additional acreage for roads. However, we believe that the original agreements did not encompass a situation whereby the original patentees or their privies would be deprived of access to any road so built, and for this reason we can only conclude that the plaintiffs through their predecessors in title have never been compensated in any form for the particular right of which the defendants now seek to deprive them. The point we are developing is that contractually the original patentees, or their privies, the plaintiffs, have never received consideration for their being deprived of access to a road constructed on the reserved acreage.

Although it might be argued that restricting access is actually using "property" for road purposes, the original reservation seems to apply only to land actually used for road construction and to unimproved land, *Plank Road Co. v. Thomas, supra*, at page 94. These are additional matters taking this present set of facts out of the operation of the rule.

#### [fol. 133] *Conclusion*

For the foregoing reasons we believe the complete deprivation of the plaintiffs' present right of access to the Airport Parkway would constitute a "taking" by the Commonwealth under its power of eminent domain for which the plaintiffs should be compensated in money damages. We do not consider the complete deprivation

by law of the right of access as being within the principle of "damnum absque injuria".

Since the "Pennsylvania Limited Access Highway Act" in its present form, as we construe it and as counsel for the defendants argues, denies the plaintiffs compensation for the proposed taking, the defendants should be permanently enjoined from enforcing it over the plaintiffs' protest.

In arriving at this conclusion, we need not consider the further arguments advanced by plaintiffs, namely, that the statute denies them equal protection of the laws because the Pennsylvania Turnpike Act permitting the Pennsylvania Turnpike Authority to take land for the construction of the Turnpike provided for the payment of consequential damages;<sup>16</sup> and that the Commonwealth is estopped from denying damages to the plaintiffs for the destruction of their right of access because when its political subdivision, the County of Allegheny, originally condemned the property in quo, the County obtained a reduction in the damages otherwise payable to the plaintiffs because of the benefits they would derive from the right of access to the parkway after it was constructed. Neither need we consider the plaintiffs' argument with regard to the impairment of obligation of contract.

An appropriate order will be entered permanently enjoining the defendants from enforcing the statute against the plaintiffs.

[Vol. 134]

#### FINAL DECREE

This cause having come on to be heard on December 2, 1955, February 13, 1956, March 22, 1956, February 12, 1957, and November 18, 1957, before a duly constituted district court of three judges convened pursuant to Title 28 U.S.C. §§2281, 2284, and all parties being represented by counsel, and the cause, by agreement of all parties, having been submitted upon final hearing, upon the pleadings, stipulations of the parties, oral argument, briefs of

<sup>16</sup> Also under the proviso in §8 it appears that some abutting property owners may in some circumstances secure compensation for consequential damages while others may not.

counsel for the parties, and the complete record of the proceedings, and this court having duly made its findings of fact and conclusions of law in the opinion filed herewith,

Now, Therefore, It Is Finally Determined, Ordered, Adjudged and Decreed that the defendants, Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and they hereby are permanently enjoined from enforcing or otherwise complying with the Pennsylvania "Limited-Access Highways Act", 1945, May 29, P. L. 1108, §1, et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq., so as to interfere with or deprive the plaintiffs of their right of ingress or egress to, from, or across the "Airport Parkway" in Allegheny County, Pennsylvania.

Austin L. Staley, Circuit Judge, John L. Miller,  
District Judge, Rabe F. Marsh, District Judge.

March 19, 1958

[fol. 134a] [File endorsement omitted]

[fol. 135]

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO,  
A. W. TUICILLO, ED KLEEMAN and R. G. CUMMISKEY,  
on behalf of themselves and other property owners and  
lessees similarly situated, Plaintiffs,

v.

LEWIS M. STEVENS, Successor to JOSEPH LAWLER, as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania, and GEORGE M. LEADER, Governor of the  
Commonwealth of Pennsylvania, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed May 9, 1958

I. Notice is hereby given that Lewis M. Stevens, Successor to Joseph Lawler, as Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, the defendants above named, hereby appeal to the Supreme Court of the United States from the Final Decree granting a permanent injunction, dated and entered in this action on March 19, 1958.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 136] 1. Transcript of docket entries.

2. Complaint (filed August 1, 1955)
3. Motion for Temporary Restraining Order and Temporary Restraining Order (filed August 1, 1955)
4. Answer (filed August 26, 1955)
5. Defendants' Motion for Summary Judgment (filed August 26, 1955)
6. Amendment to Complaint (filed September 2, 1955)
7. Answer to Amendment to Complaint (filed September 7, 1955)
8. Request for Admissions (filed October 18, 1955)
9. Response to Request for Admissions (filed October 26, 1955)
10. Motion to Amend Motion for Summary Judgment and Order (filed November 16, 1955)
11. Affidavits of Leonard P. Kane, Samuel Rothman, Maurice L. Kessler, Albert W. Tricillo, J. K. Creasy (filed November 25, 1955)
12. Affidavit of J. Cal Callahan (filed November 29, 1955)



13. Affidavit of Pawel and Mary Werbitsky (filed December 2, 1955)
14. Affidavit of Donald M. McNeil (filed December 2, 1955)
15. Affidavits of Alvin H. Mitchell and Edward K. and Marcella A. Nanz (filed December 2, 1955)
16. Transcript of Pre-Trial Hearing and Argument on Motion for Summary Judgment (held December 2, 1955)
17. Motion to Amend Answer and Order (filed December 16, 1955)
18. Stipulation of Counsel (filed December 19, 1955)
19. Order of Court (filed December 19, 1955)
20. Transcript of Pre-Trial Conference Held February 13, 1956
- [fol. 137] 21. Order Dismissing Defendants' Motion for Summary Judgment (filed February 20, 1956)
22. Stipulation of Counsel (filed March 21, 1956)
23. Transcript of Hearing on Motion for Interlocutory Injunction and For Continuance of Restraining Order Held March 22, 1956.
24. Order of Court (filed May 1, 1956)
25. Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint (including opinion and order of the Court of Common Pleas of Dauphin County, Pennsylvania, attached thereto) (filed August 9, 1957)
26. Motion for Permanent Injunction (filed August 9, 1957)
27. Answer to Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint (filed August 20, 1957)
28. Stipulation of Counsel (filed September 26, 1957).

29. Order of Court (filed October 14, 1957)
30. Transcript of Hearing Held November 18, 1957.
31. Opinion and Final Decree (filed March 19, 1958)
32. This Notice of Appeal to The Supreme Court of The United States together with proof of service thereof.

III. The following questions are presented by this appeal:

1. In an action to enjoin enforcement of a state statute, may a federal statutory court predicate its granting of equitable relief upon the ground that irreparable loss would be incurred during the time required to litigate the issue of constitutionality in the state courts, where the highest state court has already affirmed the availability of those courts to try the issue and has already upheld the constitutionality of that statute in litigation between the same parties?

[fol. 138] 2. Where Pennsylvania's highest court has held that a Pennsylvania statute, which authorizes the limiting of access to a public highway, affords an abutting property owner a means for recovering damages if found constitutionally entitled thereto, may a federal statutory court thereafter nonetheless enjoin enforcement of that statute because it independently concludes that the owner is constitutionally entitled to damages and that the statute does not make provision therefor?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting land owner or tenant for his loss of access resulting from the conversion of an unlimited access highway to a limited access highway where no land is taken?

4. Does a state statute providing for the limiting of access to a public highway, without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting land owner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

Leonard M. Mendelson, Counsel, Harry J. Rubin,  
Deputy Attorney General, Thomas D. McBride,  
Attorney General, Attorneys for Defendants.

Department of Justice, Commonwealth of Pennsylvania,  
State Capitol, Harrisburg, Pennsylvania.

[fol. 139] Proof of service (omitted in printing).

[fol. 139a] [File endorsement omitted]

[fol. 140] Clerk's Certificate (omitted in printing).

[fol. 141]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—Oct. 13, 1958

Appeal from the United States District Court for the  
Western District of Pennsylvania.

The statement of jurisdiction in this case having been  
submitted and considered by the Court, probable juris-  
diction is noted.

October 13, 1958





LIBRARY  
SUPREME COURT. U. S.

IN THE  
**Supreme Court of the United States**

October Term, 1957  
Nos. 157 And

LEWIS M. STEVENS, SUCCESSOR TO JOSEPH  
LAWLER AS SECRETARY OF HIGHWAYS OF  
THE COMMONWEALTH OF PENNSYLVANIA,  
AND GEORGE M. LEADER, GOVERNOR OF  
THE COMMONWEALTH OF PENNSYLVANIA,  
*Appellants*

v.  
J. K. CREASY, WILLIAM W. McNAMEE,  
FRANK RANALLO, A. W. TUICCHILLO, ED  
KLEEMAN AND R. G. CUMMISKEY, ON BE-  
HALF OF THEMSELVES AND OTHER PROP-  
ERTY OWNERS AND LESSEES SIMILARLY  
SITUATED,

*Appellees (No. 1)*

and

JACK C. MARSHELL AND ALICE E.  
MARSHELL,

*Appellees (No. 2)*

*On Appeal from the United States District Court  
for the Western District of Pennsylvania.*

**JURISDICTIONAL STATEMENT**

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HARRY J. RUBIN

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*Attorney General*

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Case Caption

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1957

Nos. \_\_\_\_\_ and \_\_\_\_\_

Lewis M. Stevens, Successor to Joseph Lawler, as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania, and George M. Leader, Governor of the  
Commonwealth of Pennsylvania,

Appellants

v.

J. K. Creasy, William W. McNamee, Frank Ranallo,  
A. W. Tuicillo, Ed Kleetman and R. G. Cumiskey, on  
Behalf of Themselves and Other Property Owners and  
Lessees Similarly Situated,

Appellees (No. \_\_\_\_\_)

and \_\_\_\_\_

Jack C. Marshall and Alice E. Marshall,

Appellees (No. \_\_\_\_\_)

*On Appeal from the United States District Court for the  
Western District of Pennsylvania.*

*Jurisdictional Statement  
Opinion Below*

**JURISDICTIONAL STATEMENT**

Appellants appeal from the final decree of the United States District Court for the Western District of Pennsylvania, entered on March 19, 1958, permanently enjoining them from enforcing or complying with the Pennsylvania Limited Access Highways Act of May 29, 1945, Pamphlet Laws 1108, as amended, 36 Pa. Stat. Ann. §§2391.1 to 2391.15, so as to interfere with or deprive plaintiffs (appellees here) of their right of ingress or egress to, from or across the "Airport Parkway," a public highway in Allegheny County, Pennsylvania, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

**OPINION BELOW**

The opinion of the District Court for the Western District of Pennsylvania is reported at 160 F. Supp. 404. A copy of the opinion and final decree is attached hereto as Appendix A.

## STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

These actions were brought under 28 U.S.C. §1331 (and also §1332 in the Marshall case), to have declared unconstitutional as applied to plaintiffs, the Pennsylvania Limited Access Highways Act of May 29, 1945, Pamphlet Laws 1108, as amended, 36 Pa. Stat. Ann. §§2391.1 to 2391.15, and to have defendants (appellants here) enjoined from enforcing said statute as to plaintiffs. A three-judge district court heard and determined the cases in accordance with 28 U.S.C. §§2281 and 2284. The decree of the District Court was dated and entered on March 19, 1958; and notice of appeal was filed in that court on May 9, 1958. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b) and is sustained by *Morey et al. v. Doud*, 354 U. S. 457 (1957), and *Williamson et al. v. Lee Optical of Oklahoma, Inc. et al.*, 348 U. S. 483 (1955).

## STATUTE INVOLVED

The statute involved in this case is the Pennsylvania Limited Access Highways Act of 1945. The statute may be found in the 1945 volume of the Pennsylvania Pamphlet Laws at pages 1108 to 1112. It may also be found in Title 36 of Purdon's Pennsylvania Statutes Annotated (Pocket Parts) §§2391.1 to 2391.15. The statute is set forth in Appendix B hereto.



## QUESTIONS PRESENTED

1. In an action to enjoin the enforcement of a state statute, may a federal three-judge court predicate its grant of equitable relief on the ground that plaintiffs would incur irreparable loss during the time required to litigate the issue in the state courts, where the highest court of the state already has affirmed the availability of the state courts to hear and determine the issue and already has upheld the constitutionality of the state statute in litigation between the same parties?

2. Where the highest court of Pennsylvania has held that a Pennsylvania statute, which authorizes the limiting of access to a public highway, affords an abutting property owner a means for recovering damages if found constitutionally entitled thereto, may a federal three-judge court, nonetheless, enjoin enforcement of that statute because it independently and subsequently concludes that the owner is constitutionally entitled to damages and that the statute makes no provision therefor?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting land owner or tenant for his loss of access resulting from the conversion of an unlimited access highway to a limited access highway, where no land is taken?

4. Does a state statute, providing for the limiting of access to a public highway without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting land owner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

## STATEMENT OF THE CASE

On August 1, 1955, and subsequently, plaintiffs filed complaints in the United States District Court for the Western District of Pennsylvania seeking to have the Pennsylvania Limited Access Highways Act of 1945 declared unconstitutional and to enjoin both the Governor and the Secretary of Highways of Pennsylvania from enforcing that Act as to the "Airport Parkway" in Allegheny County, Pennsylvania.<sup>1</sup> At the same time plaintiffs moved for, and were granted *ex parte*, a temporary restraining order.

In their complaints plaintiffs alleged that they either owned or leased land abutting upon the Airport Parkway, that their existing enjoyment of unlimited access to that highway represented an element of value to the properties (some of them being used or contemplated for use as commercial establishments), and that defendants, acting under the aforesaid statute, were about to declare the road to be "limited access," the effect of which would be to limit ingress and egress to, from or across the highway to points specifically designated by the Secretary of Highways. Such action, it was alleged, would inflict upon plaintiffs losses in excess of the requisite jurisdictional amount.

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<sup>1</sup> Since the rights of all appellees are identical, they will be referred to as "plaintiffs." It may be noted, however, that certain of them intervened after the original action was filed and also that plaintiffs Marshall assert diversity of citizenship as an additional ground of jurisdiction. The separate actions were consolidated at an initial stage and proceeded together thereafter.

Plaintiffs' contention was that the limiting of access to the Airport Parkway would deprive them of their property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment and would impair the obligations of their contracts in violation of Article I, Section 10, clause 1, of the United States Constitution. These deprivations allegedly would stem from the fact that plaintiffs would not receive compensation from the state for their loss of access because no land was being taken and because the governing statute provided that the Commonwealth would not be liable for consequential damages in the absence of a taking of property.

On March 2, 1956, plaintiffs, at the instance of the District Court, proceeded to file a similar action in a Pennsylvania court of first instance. That court dismissed the complaint on the holding that the Limited Access Highways Act afforded a complete and adequate statutory procedure by which plaintiffs could litigate any claim to damages arising from the limiting of highway access and guaranteed the payment of such damages if plaintiffs were found to be constitutionally entitled thereto. The court's opinion is attached hereto as Appendix C and is reported at 8 Pa. D. & C. 2d 535. This decision was affirmed by the Supreme Court of Pennsylvania, per curiam, with a statement (Appendix D) adopting as its own the opinion of the court of first instance. The appellate decision is reported at 389 Pa. 635, 133 A. 2d 178 (1957). No appeal to this Court was taken.

Following the state court's decision, plaintiffs moved in the District Court (which had stayed proceedings pending determination of the state litigation) for a permanent injunction, and defendants moved for dissolution of the

temporary restraining order and for dismissal of the complaint. All significant facts by that time had been either admitted by the answer or stipulated by the parties. On March 19, 1957, the District Court handed down its decision which permanently enjoined defendants from enforcing as against plaintiffs the Limited Access Highways Act on the ground of its unconstitutionality. The District Court held that it had jurisdiction because there was present a substantial federal question, the requisite jurisdictional amount and, in the *Marshall* case, diversity of citizenship. It decided to exercise this jurisdiction because otherwise plaintiffs "would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts. . . ." (Appendix A; p. 28, *infra*). The court recognized that the limiting of access to highways is a proper subject for exercise of the state's police power. It held, however, that the enjoyment of access to an abutting highway is a property right, that the deprivation of such access constitutes a taking of property for which compensation must constitutionally be paid, that the Pennsylvania statute does not provide for such compensation and that, accordingly, the act is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.



## THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial issues concerning the proper sphere of the federal courts in a proceeding to restrain the action of state officials acting under an allegedly unconstitutional state statute (questions 1 and 2, *supra*) and the reach of the Constitution of the United States as it relates to a state's duty to pay compensation to abutting property owners adversely affected by state action in limiting access to a public highway unaccompanied by any physical appropriation (questions 3 and 4, *supra*). The nationwide significance of the issues thus presented is accentuated by the Federal Aid Highway Act of 1956, as amended, 70 Stat. 374 to 402 (1956), 23 U.S.C.A. §§151 to 175, which provides for access control of roads in the Interstate System of Highways, the cost of which is shared by the federal government and the states.

1. Although recognizing that a federal court should be reluctant to exercise jurisdiction where a plaintiff's constitutional rights will be properly protected in the state courts and where the state statute has not been construed by the state judiciary, the District Court, nevertheless here determined to exercise its jurisdiction. It assigned as its reason that plaintiffs would be irreparably injured during the time necessary to litigate the constitutional issue in the state courts (Appendix A, p. 28, *infra*). In so doing, the District Court, surprisingly enough, fails to note the fact

<sup>2</sup> 70 Stat. 380, 383, 23 U.S.C.A. §§158(i), 163.

### *The Questions Are Substantial*

that, at its own instance, the constitutionality of this very statute had already been litigated in the aforementioned state court, proceeding between the very parties to this action, with the result that the constitutionality of the legislation had already been upheld by the highest state court. When the parties then returned to the District Court, the sole constitutional issue before that court was whether the statute, in guaranteeing the property owners a means of litigating their claims to damages and of obtaining such damages as they might be constitutionally entitled to receive, comported with the requirements of the Federal Constitution. Consequently, the applicability of the principle invoked to the actual facts may be seriously questioned.

*Toomer et al. v. Witsell et al.*, 334 U.S. 385 (1948), the sole authority cited by the District Court in support of its exercise of discretion, is inapposite. In that case, Georgia fishermen sued to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing. These statutes in part discriminated against non-South Carolina fishermen and imposed a fine of up to \$1,000 and imprisonment of one year for violation. The Court there found that, to comply with the statutes, plaintiffs would be required to pay large sums of money for which no means of recovery was provided, that defiance

The extent of the District Court's action becomes even more difficult to understand if reference is made to the pretrial hearing of February 13, 1956, where in five separate places (pp. 17, 18, 23, 32-a and 33) Circuit Judge Staley said that, if the Pennsylvania statute was interpreted by the state courts so as to provide a remedy by which plaintiffs could test their right to damages in the state courts, the statute was constitutional and the federal court had no further jurisdiction.

bore the risk of heavy fine and long imprisonment,<sup>4</sup> and that withdrawal from fishing would entail a substantial and noncompensable loss of business. Under these circumstances, this Court upheld the exercise of federal jurisdiction. At the same time, the Court decided against the exercise of jurisdiction with respect to a statute which involved only a question of money and provided a state remedy. It is submitted that the Court's treatment of this last statute is the more applicable to the case at bar.

Moreover, plaintiffs do not here claim that the statute is unconstitutional because it permits Pennsylvania to limit the access on existing highways; the power of the state to do so is not questioned. The sole basis for the claim of unconstitutionality is that the statute allegedly precludes the payment of damages to plaintiffs. Unlike the situation in the *Tomer* case, *supra*, where the fishermen were faced with the choice between giving up their trade or acceding to unconstitutional restrictions, no claim is here made that the state cannot take the contemplated action despite the adverse effect upon abutting owners.

The District Court's fear that the state courts might later find that Creasy has no constitutional and, thus, no statutory right to damages cannot affect the constitutionality of the statute itself. Of course a misinterpretation by the state courts of the Fourteenth Amendment's requirement of compensation would be subject to federal review.

<sup>4</sup> In contrast, the Pennsylvania statute challenged in the case at bar provides for a fine of only five to twenty-five dollars or one day's imprisonment for each dollar of unpaid fine. This penalty is provided in a section which is no more than a traffic regulation for limited access highways and applies to all persons who use the highways, not just to abutting property owners.

The District Court's opinion fails to appreciate this distinction.

That the District Court erred in reaching over to adjudicate a heretofore unresolved question of Pennsylvania property law is evident from the fact that all federal questions would disappear if the state courts, in the proceeding provided for by the statute, should hold that the enjoyment of highway access is a property right for the limitation of which Pennsylvania law requires compensation to be paid. The Court's action is not justified by *Toomer et al. v. Witsell et al.*, supra, or by any other case known to appellants, and is inimical to the philosophy expressed in *Alabama Public Service Comm'n v. Southern R. Co.*, 341 U.S. 341 (1951), and *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926).

2. The opinion of the lower Pennsylvania court, Appendix C, infra, adopted by the Pennsylvania Supreme Court in its per curiam order of affirmance, Appendix D, infra, holds (1) that the Pennsylvania Limited Access Highways Act provides for a statutory proceeding whereby a property owner who claims a right to damages may litigate such claim and (2) that in such statutory proceeding he will recover such damages as he is constitutionally entitled to receive. Because it was not within the province of the state courts in the equity proceeding to determine whether a property owner's loss of highway access, unaccompanied by a taking of land, constitutes a constitutionally compensable property deprivation, the Pennsylvania courts properly refrained from deciding this issue. They clearly decided, however, that if such a loss of access is constitutionally compensable, the Pennsylvania statute requires the payment of compensation and provides a



method for determining both the right to and extent of the damages. In effect, the state courts held that the breadth of the statute is measured by the protection of the Constitution, the statutory compensation requirement being as broad as, but no broader than, that of the Constitution itself.

In holding that the Pennsylvania statute does not provide for compensation for what the District Court regarded as the taking of a property right, the District Court has given the statute an interpretation which clearly conflicts with that of the state judiciary. If the limiting of highway access, unaccompanied by an appropriation of land, really does constitute the taking of a property right, then, according to the state courts, the statute guarantees compensation therefor. The contrary decision of the District Court, in effect, overrules the Supreme Court of Pennsylvania in the latter's construction of the state statute. This construction is binding on the federal courts. *Albertson et al. v. Mullard et al.*, 345 U.S. 242, 244 (1953); *Aera Mayflower Transit Co. v. Commissioners et al.*, 332 U.S. 495, 499-500 (1947).

There was, we submit, no occasion for the District Court to determine whether a property owner is entitled to compensation for the deprivation of highway access. Such determination depends upon whether Pennsylvania law recognizes the enjoyment of access as a property right,<sup>5</sup> an issue which will be answered by the state courts in the statutory proceeding. If, in such proceeding, the Supreme Court of Pennsylvania should hold that the property owners have no constitutional and, thus, no statutory right to

<sup>5</sup> Cf. *For River Paper Company et al. v. Railroad Commission of Wisconsin*, 274 U.S. 631 (1927).

damages, that decision may then be subjected to federal review. Plaintiffs' rights, whatever they may be, will thus be fully protected.

Furthermore, the District Court erred in its approach to the severability of the act's provisions. After holding unconstitutional the compensation provisions of the statute, which are found in § 8 (Appendix B, *infra*, pp. 48-49), the court, despite the severability clause in § 15 of the act itself (Appendix B, *infra*, p. 51) and the general severability requirement of Pennsylvania's Statutory Construction Act, Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. § 555, proceeded to void the entire statute (Appendix A, *infra*, p. 39). It is submitted that, at most, the District Court should have struck down the provisions which, according to it, forbade the payment of compensation and upheld the rest of the act, including the provisions providing for statutory proceedings to determine damages. In the absence of a determination against severability by the state courts, federal courts should not rush in to void entire state statutes which contain provisions for severability. *Watson et al. v. Buck et al.*, 313 U.S. 387 (1941); *Dorchy v. Kansas*, 264 U.S. 286 (1924).

3. This case, as far as our research discloses, is the first instance in which a federal court has invalidated a state statute designed solely to facilitate the movement of highway traffic. Although the District Court recognized that the state's police power may properly be directed towards the limiting of access to its highways, it erroneously concluded that the abutting owner's enjoyment of access is superior to the public interest in best utilizing highways for the purpose for which they were constructed.

Limitation of highway access under this statute can occur in three ways: (1) simultaneously with the construc-

tion of a new road, (2) to an existing road accompanied by a taking of some land of abutting owners, or (3) to an existing road, without a taking of any abutting land. The present case involves only the third situation.

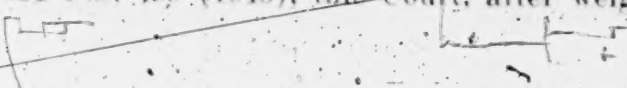
While the constitutions of many states require the payment of compensation where property is damaged or injured, even though not taken, the constitutions of many other states (including Pennsylvania), like that of the United States, require compensation to be paid by the sovereign only where property is taken. Under the United States and Pennsylvania constitutions an abutting land owner's right to compensation for loss of highway access in the third situation thus depends not only on whether the enjoyment of highway access is regarded as a property right but also on whether the restriction thereof is regarded as a "taking" in the constitutional sense. There appears to be no case in Pennsylvania or elsewhere which precisely adjudicates this issue; however, the application of principles well established under analogous facts would dictate here a result favorable to appellants' contention that compensation is not constitutionally required where a public highway is converted from unlimited to limited access without an appropriation of land.

Although the limiting of access to the Airport Parkway might work a hardship upon plaintiffs or lessen the value of their land or impair existing or contemplated uses thereof, the inflicting of such incidental injuries resulting from the proper exercise of state police power does not in and of itself necessitate the payment of damages. *C. B. & Q. Railway Company v. Drainage Commissioners*, 200 U.S. 561, 584, 593 (1906); *New Orleans Public Service, Inc., v. City of New Orleans*, 281 U.S. 682 (1930).

In *Sauer v. City of New York*, 206 U.S. 536 (1907), New York City, pursuant to state authorization, constructed over a public street an iron viaduct resting upon iron columns placed in the roadway. The construction and maintenance of the viaduct impaired plaintiff's access to his property abutting upon the street, as well as his light and air. Plaintiff's claim for damages was rejected, this court holding that, as in the case of a change of grade, an abutting land owner is not entitled under the due process clause of the Fourteenth Amendment to damages for impairment of access to a roadway or of light or air arising from construction or maintenance of public improvements in a street. Thus, on a set of facts closely analogous to that at bar, relief was denied. If the making of a physical improvement in a public thoroughfare does not entitle an adjacent property owner to damages for loss of access, there is, we submit, no reason why the same result should not follow from the enforcement of a state police regulation having the same effect upon highway access.

The issue in *Delaware River Comm'n v. Colburn*, 310 U.S. 419 (1940), as stated by this Court, was "the right of respondents to recover consequential damage to their New Jersey land due to interference with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land." The Court resolved this issue against the abutting owners, citing numerous cases, many of them decided in Pennsylvania, which hold that consequential damages may not be recovered where loss of access is inflicted by the erection of structures on public thoroughfares.

Similarly, in *United States v. Wilbur Run Power Co.*, 324 U.S. 499 (1945), this Court, after weighing the com-





peting interests of the public and a riparian land owner, concluded that damages need not be paid where governmental action in lowering the level of a river without a taking of any land adversely affected the capacity of the claimant's power plant. This Court there referred with approval to cases holding that a property owner abutting upon a public highway is not entitled to recover damages for losses resulting from a change in the grade of a highway where no physical appropriation occurs. See to the same effect: *Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Gibson v. United States*, 166 U.S. 269 (1897). While the foregoing cases involve the erection of physical barriers, the accomplishment of a similar result without an actual erection of barriers should produce no different legal consequence, for it would be a simple matter for the state to erect such barriers in order to limit highway access in the case at bar.

The complexity of the compensation issue can be appreciated by considering the differing effects which the contemplated state action may have upon the various plaintiffs. In some cases, the abutters may be completely landlocked; in others, they may have access to a local service road, the construction of which is authorized by § 3 of the challenged statute; some abutters may enjoy access to other existing roads; and others may have access to points of ingress and egress established by the state under § 1 of the act. The state's liability may vary according to the situation presented. Under such circumstances the District Court should not have rushed in to determine in the abstract these complicated and novel questions.<sup>6</sup> As we

<sup>6</sup> The District Court's opinion reflects the confusion of the present Pennsylvania case law. For example, the opinion first cites *Breinig et ux. v. Allegheny County et al.*, 332 Pa. 474, 2 A.

have previously emphasized, the statutory proceeding provides the best means of resolving these issues without thwarting valid action by the Commonwealth or sacrificing the constitutional rights of the plaintiffs.

4. Although appellants believe that deprivation of highway access, unaccompanied by a taking of land, does not constitutionally entitle an abutting property owner to damages, a contrary conclusion would not affect the validity of the Pennsylvania Limited Access Highways Act, Section 8, upon which the District Court based its holdings of unconstitutionality, provides that "The owner or owners of private property affected by the construction or designation of a limited access highway : . . shall be entitled only to damages arising from an actual taking of property," and declares merely that "The Commonwealth shall not be liable for consequential damages where no property is taken." Nothing in this language purports to relieve the state of its constitutional obligation to pay damages where property is taken. Thus, if the District Court is correct in its position that plaintiffs' loss of highway access constitutes a taking of property, this statute on its face requires the payment of damages therefor. Appellants have never argued otherwise. No court has ever decided otherwise.

Furthermore, the denial of consequential damages in the absence of a taking of property infringes upon no constitutional guarantees; this Court has specifically held

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2d 842 (1938), to show that the Pennsylvania Courts regard access as a property right and later cites *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, 162 Atl. 309 (1932), to show that the same courts deny compensation for obstruction of access without a physical appropriation of property.

that compensation for consequential losses is not constitutionally required. *U.S. v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *U. S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-84 (1943); *Mitchell et al. v. United States*, 267 U.S. 341 (1925). The statute thus does not unconstitutionally restrict the liability of the state.

The District Court refrained from discussing or determining plaintiffs' contentions that the state statute denies them the equal protection of the laws and impairs the obligations of their contracts. We therefore merely note that neither of these constitutional provisions restrict the state in the valid exercise of its police powers. *N.Y. & N.E.R.R. Co. v. Bristol*, 151 U.S. 556 (1894); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); see *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923).

In completely invalidating this statute, the salutary effects of which are undenied, the District Court unprecedently restrained the state in the regulation of its highways—a matter peculiarly of local concern. See *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

It is submitted that the decision of the District Court proceeded upon an exercise of jurisdiction unjustified by the facts and circumstances here present; that it construed the Pennsylvania statute contrary to the interpretation given it by the state courts; that it erroneously found a constitutional right to damages in loss of access to a public highway where no land is taken; and that it mistakenly held unconstitutional a compensation provision which fully comports with the requirements of the United States Constitution.

*The Questions Are Substantial*

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Appellants believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Appellants

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## APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED  
STATES*For the Western District of Pennsylvania*

Civil Action No. 13672

J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuicillo, Ed Kleeman and R. G. Cumisky, on behalf of themselves and other property owners and lessees similarly situated,

*Plaintiffs*

vs.

Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania,

*Defendants*

Civil Action No. 13841

Jack C. Marshall and Alice E. Marshall,

*Plaintiffs*

vs.

Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania,

*Defendants*

OPINION AND ORDER

OPINION

Marsh, District Judge.

The plaintiffs in these actions before a statutory court<sup>1</sup> seek to have a statute of the Commonwealth of Pennsylvania, Act of 1945, May 29, P. L. 1108, § 1 et seq., as amended, 36 Purdon's Pa. Stat. Ann. § 2391.1 et seq. (hereinafter referred to as "statute"), as applied to them, declared violative of the Constitution of the United States, and to have the defendants, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania, permanently enjoined from enforcing said statute. We think they are so entitled.

Most of the important facts have been stipulated.<sup>2</sup> The plaintiffs are owners or tenants of land in Allegheny County, Pennsylvania, abutting a public highway known as the "Airport Parkway" (hereinafter, referred to as "parkway"), which highway extends from U. S. Routes 22-30, with which it intersects, to the Greater Pittsburgh Airport in said county.

Under the statute, the Secretary of Highways of Pennsylvania, with the approval of the Governor of Pennsylvania, is empowered to take over existing highways in the Commonwealth of Pennsylvania and to declare any such highway a "limited access highway" which is defined by

<sup>1</sup> Convened pursuant to Title 28 U.S.C. §§2281, 2284.

<sup>2</sup> Stipulation of counsel filed December 19, 1955; defendants' waiver of objections to plaintiffs' findings of fact; see transcript of hearing March 22, 1956, pages 68 et seq.

the statute as a "... public highway to which owners or occupants of abutting property, or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor ...", 36 Purdon's Pa. Stat. Ann. § 2391.1. Section 8 of the statute, 36 Purdon's Pa. Stat. Ann. § 2391.8, provides that "... the owner or owners of private property affected by the ... designation of a limited access highway ... shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken ..."

The defendants admit that were it not for the restraining order and a subsequent preliminary injunction granted by this court, the parkway would have been taken over as a state highway and designated a "limited access highway" under the statute. In that event, which would be the first instance in Pennsylvania where an existing highway has been designated a limited access highway under the statute, all of the plaintiffs will be denied direct access to the parkway from their land. Certain of the plaintiffs will have no means of access on any public highway, and in effect their property will be land-locked and completely inaccessible for most purposes. In declaring the parkway a limited access highway, under the authority of the statute, the Commonwealth would not take any land or improvements presently owned or leased by the plaintiffs.

Plaintiffs assert that § 8 of the statute, under the present decisional law of the Supreme Court of Pennsylvania, denies them compensation for any deprivation of access not accompanied by an actual physical taking of land, and in that event they would be deprived of property

without due process of law as guaranteed them by the Fourteenth Amendment of the United States Constitution.

Initially, the instant proceedings were stayed because we were of the opinion that whether a substantial federal question was involved depended on the construction given the statute, and, further, we were unwilling to resolve that issue until the courts of the Commonwealth of Pennsylvania first had an opportunity to construe the statute in respect to the matter here in controversy.

Accordingly, the plaintiffs filed an action in equity against the defendants in the Court of Common Pleas of Dauphin County, Pennsylvania, requesting relief identical to that sought here.

Upon preliminary objections of the defendants, the Dauphin County Court dismissed the plaintiffs' complaint, holding that under §8 of the statute, the plaintiffs were afforded an adequate remedy at law to test their right to damages, if any, before a board of viewers. It specifically refrained from adjudicating the pivotal issue of whether or not plaintiffs could recover damages in such proceedings. On appeal, the Supreme Court of Pennsylvania affirmed the decision of the lower court.<sup>3</sup>

Subsequently, the plaintiffs filed a motion here for a permanent injunction enjoining the defendants from enforcing the statute, and on the same date, the defendants moved to dissolve the preliminary injunction and to dismiss the complaint, which matters are presently before the court for decision.

<sup>3</sup> *Creasy v. Lawler*, 389 Pa. 635, 133 A.2d 178 (1957), in which the opinion of the Dauphin County Court is quoted verbatim and adopted per curiam.



Some of the plaintiffs have established on their land certain businesses, i.e., service stations, restaurants, and an amusement park. Other properties are presently occupied as residences or farms; but because of the advantage of direct access to the parkway, possess great value as potential commercial sites.

At the time these proceedings were instituted and at the present time, the parkway is the principal thoroughfare for vehicular travel between the City of Pittsburgh, Pennsylvania, and the Greater Pittsburgh Airport, and a vast number of vehicles daily pass the properties of the plaintiffs. The success of all the businesses now in existence and those contemplated by the plaintiffs, or their prospective assigns, depends almost entirely on the continued enjoyment of access to the parkway.

In the past, some of the plaintiffs had been carrying on negotiations to either sell or lease their land for very attractive prices, but the negotiations were broken off by the interested parties because of the publicity connected with the plans of the Commonwealth to designate the parkway a limited access highway.

It is impossible at this time to ascertain with any degree of certainty the extent or degree of damage that would be incurred by the individual plaintiffs because of the deprivation of access involved; however, it would appear from convincing testimony introduced by the plaintiffs that the properties as a whole would depreciate in value in an amount in excess of one million dollars.

The parkway is presently maintained by the County of Allegheny, having been constructed by it in 1949 after it condemned, through the exercise of its power of eminent domain, the necessary quantities of land for the right-of-

way. In some instances, part of the land owned or leased by the plaintiffs was "taken". In accordance with the established law in Pennsylvania, the Board of Viewers when assessing damages to the property owners for their land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new parkway and the access thereto.

### *Jurisdiction.*

Federal jurisdiction in these cases is based on the plaintiffs' allegation of a substantial federal question, to-wit, that the "Pennsylvania Limited-Access Highway Act" as applied to them is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del. & W. R.R. v. Morristown*, 276 U. S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law §646.

Each of the plaintiffs proved that if the parkway were designated limited-access, he would suffer damages in excess of the requisite jurisdictional amount,<sup>6</sup> and in the

Cf. *In Re Appointment of Viewers, etc.*, 344 Pa. 5, 23 A. 2d 880, 881 (1942); see also "State Highway Law" of Pa., Act of 1945, June 1, P. L. 1242, Art. 411, §203, 36 Purdon's Pa. Stat. Ann. §670-303, with regard to the present procedure in assessing damages for land taken for state highways.

The defendants contend that the Viewers also considered the possibility of the parkway being subsequently designated a limited access road because the statute was then in effect. The evidence in this respect was not convincing.

The defendants not only do not seriously contend that each plaintiff would suffer damage in excess of \$3,000, the jurisdictional amount, but in effect so stipulated as to the original plaintiffs by advising the court that they had no objection to the plaintiffs'

Marshall case, there is the additional allegation of diversity of citizenship.

Both cases were consolidated for hearing, and as required by 23 U.S.C. §2281 were heard by a three-judge court. The defendants concede that this court has jurisdiction; however, relying on the authority of *City of El Paso et al. v. Texas Cities Gas Co.*, 400 F.2d 501, 503 (5th Cir. 1938), *cert. den.* 306 U. S. 650, *reh. den.* 306 U. S. 669, and *Alabama Public Service Commission et al. v. Southern Railway Co.*, 341 U. S. 341 (1951), contend that we should not exercise our jurisdiction and grant the extraordinary relief requested because of the disinclination of the federal courts to interfere in state matters before remedies afforded by the state have been exhausted, and, especially so, where the State Courts have not yet rendered a clear or definitive decision as to the meaning of the statute.

In *Alabama Public Service Comm. et al. v. Southern Railway Co.*, supra, the Supreme Court of the United States, although assuming it had jurisdiction, refused to exercise it to examine the constitutionality of an order of the Alabama Public Service Commission denying a permit to the plaintiff to discontinue certain intrastate trains on

"Request for Findings of Fact" No. 3 (T. 3/22/56, p. 68), and as to the intervening plaintiffs, the defendants were willing to stipulate if this court had granted the defendants' petition for an injunction they had requested during the proceedings, enjoining certain of the plaintiffs from effecting a change in the local zoning laws or improving their properties pending the outcome of these actions (T. 3/22/56, p. 122).

<sup>7</sup> See defendants' brief filed November 18, 1955, p. 4; any doubt as to whether the Federal Courts have jurisdiction to determine the constitutional validity of a state statute not yet construed by the State Courts has been dispelled by the Supreme Court of the United States in *Doud v. Hodge*, 350 U. S. 485.

the ground that they were being operated at a loss. The plaintiff under Alabama law had the right prior to instituting the action in the federal court to have the order reviewed by the state courts but chose not to do so. The Supreme Court declined to exercise jurisdiction as a matter of sound equitable discretion because of comity, and because it concluded that the court's intervention was not required to protect the plaintiff's constitutional rights.

Likewise in *City of El Paso et al. v. Texas Cities Gas Co., supra*, the United States Court of Appeals for the Fifth Circuit reversed the granting of a preliminary injunction to enjoin the enforcement of a city ordinance where the plaintiff had not taken an appeal provided by state statute.

We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined, and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer v. Witsell et al.*, 334 U. S. 385 (1948).

If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all likelihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses depend-



ent on the continued right of access would be deprived of an opportunity to realize a successful completion of the negotiations.

Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer v. Witsell, supra*, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities, §9 of the statute, 36 *Purdoh's Pa. Stat. Ann.* §2391.9.

#### *Eminent Domain or Police Power*

The plaintiffs contend that if the parkway is declared a limited-access highway by the defendants in accordance with the authority vested in them by the statute, the resultant total destruction of their right of access to the parkway amounts to a "taking" under the Commonwealth's power of eminent domain, thereby imposing a duty on the Commonwealth to pay them compensation.

On the other hand the defendants contend that the statute is a valid and legitimate exercise of the Commonwealth's police power, and even though property rights of the plaintiffs may be destroyed by the application of the statute, there is no duty imposed on the Commonwealth under the Fourteenth Amendment of the Constitution to pay compensation to the plaintiffs.

The power of eminent domain and the police power have been defined and contrasted by the Supreme Court of Pennsylvania in *Appeal of White*, 287 Pa. 259, 134 Atl. 409, 411 (1926), as follows:

" 'Police power' should not be confused with that of eminent domain. Police power controls the use of property by the owner, for the public good, its use otherwise being harmful; while 'eminent domain' and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed."

See also, *C. B. & Q. Railway v. Drainage Comm'rs.*, 200 U. S. 561 (1906); *New Orleans Public Service v. New Orleans*, 281 U. S. 682 (1930).

Though property may be regulated to a certain extent under the police power, if the regulation goes too far, it will be recognized as a taking. *Penna. Coal Co. v. Mahon*, 260 U. S. 393 (1922).

The ultimate decision as to proper exercise of the police power rests with the courts, and, if the exercise goes too far, there is a judicial duty to investigate and declare the exercise of the police power invalid. *Appeal of White, supra.*

In *Penna. Coal Co. v. Mahon, supra*, at pages 415-416, Justice Holmes, speaking for the court, had the following to say about the police power of the Commonwealth of Pennsylvania unconstitutionally exercised by it under the "Kohler" Act which forbade the mining of coal in such a way as to cause the subsidence of dwellings:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions."

See also, *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, 36 (1951).

The defendants cannot successfully maintain that the plaintiffs would not be deprived of property rights by the change of the parkway into a limited-access highway.

The right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation. 29 C.J.S. Eminent Domain, §105; 18 Am. Jur., Eminent Domain §§158, 183, and cases cited thereunder.

The Pennsylvania courts have also recognized it as a property right. *Bréinig et ux. v. Allegheny County et al., Appellants*, 332 Pa. 474, 2 A. 2d 842 (1938); and *Lang v. Smith*, 113 Pa. Super. 559, 173 Atl. 682, 683 (1934), wherein the court said:

" 'That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized. . . . ' "

In *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 301-302 (1905), the Supreme Court of the United States, discussing the rights of abutting property owners, stated as follows:

" . . . The right may be regarded in the nature of an incorporeal hereditament. . . . The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property. ' "



We agree that the construction and designation of limited-access highways is a proper subject of police regulation and legislation by the Commonwealth insofar as it relates to the welfare and safety of the public; however, we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such.

Most authorities on limited-access highways recognize that where an established "land-service" road, as is the parkway presently, in which the normal right of access has already come into being, is converted into a limited-access highway in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation exactly as they would be if such rights were destroyed by any other type of construction. See: "Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street", 43 A.L.R. 2d 1072, 3, p. 1074; 18 Am. Jur., Eminent Domain §§183, 184, 185 and cases cited thereunder. See also, the following articles: *Clark, The Limited Access Highway*, 27 Wash. L. R. 111, 121 (1952); *Cunningham, The Limited Access Highway from a Lawyer's Viewpoint*, 13 Mo. E. R. 19 (1948); and *Freeways and the Rights of Abutting Owners*, 3 Stanford L. R. 298 (1951). The Supreme Court of Wisconsin in the recent case of *Charles Carrazalla v. State of Wisconsin et al.*, 269 Wis. 593, 71 N.W. 2d 276 (1955), recognizing those articles as authoritative, referred to them as follows:

The authors of all three articles agree that the limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid out or re-located highway, where no prior right of access existed

on the part of abutting land owners, such abutting land owners are not entitled to compensation. *On the other hand, the authorities cited in these articles hold that where an existing highway is converted into a limited-access highway with a complete blocking of all access from the land of the abutting owner there results the taking of the preexisting easement of access for which compensation must be made through eminent domain . . .*" (emphasis ours)

These articles are also referred to as "instructive discussions" on the subject by the Supreme Court of Missouri in *State v. Cleenger*, 365 Mo. 970, 291 S.W. 2d 57 (1956).

Nor can the defendants successfully maintain that no taking would be involved in the deprivation of plaintiffs' access to the parkway merely because the defendants do not contemplate the destruction or physical appropriation of the plaintiffs' land. *Cf. United States v. Causby*, 328 U. S. 256 (1946); *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955).

The Supreme Court of Pennsylvania discussed the development of the law with regard to when a "taking" has occurred in *Miller v. City of Beaver Falls*, *supra*, as follows:

The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title and posses-

sion remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*" . . .

" . . . The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.* We do not propose that our Federal or State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest."

Therefore, we conclude that the proposed deprivation of the plaintiffs' access to the parkway would constitute a taking of property in the constitutional sense under the Commonwealth's power of eminent domain for which compensation must be paid to plaintiffs.

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**DOES THE STATUTE CONFORM WITH THE  
DUE PROCESS PROVISIONS OF THE FEDERAL  
CONSTITUTION INsofar AS IT IS AN EXER-  
CISE OF THE COMMONWEALTH'S POWER OF  
EMINENT DOMAIN?**

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It is an arresting feature in the case at bar that while plaintiffs are most apprehensive that §8 of the statute may

be construed to deny to them compensation for loss of access since none of their land will be taken, the defendants vigorously contend that such was the intention of the Pennsylvania Legislature, and that if plaintiffs are relegated to their remedy at law, the Pennsylvania Supreme Court will so hold. Moreover, the defendants frankly assert that they would also urge this construction of the statute on the Pennsylvania Courts.<sup>8</sup> Both sides have presented persuasive argument and Pennsylvania decisions to support this interpretation.

But defendants contend that the statute is constitutionally sound because §8 thereof provides plaintiffs with an opportunity to test their right to compensation in the State Courts beginning with a board of viewers.

Plaintiffs contend that we should examine this statute and determine whether or not it provides them with a certain and reasonably prompt right to compensation for loss of access where there is no taking of their land. They argue that if it does not, the statute, *inter alia*, is violative of due process under the Fourteenth Amendment. They earnestly urge upon us that if the statute is unconstitutional, it would be highly inequitable to compel them to pursue a remedy at law in the State Courts, only to have judicially determined that plaintiffs cannot recover compensation under the statute,—the very result which plaintiffs fear and of which defendants are convinced.

Without venturing to predict the ultimate decision of the Pennsylvania Courts on the issue of compensation, we think in these circumstances it is our duty now to examine §8 of the statute, construe it in the light of the pertinent

<sup>8</sup> Transcript of hearing (11/18/57), p. 41; see also, *id.*, pp. 4, 31, and transcript of hearing (2/12/57), pp. 8-9. >



Pennsylvania Supreme Court decisions, and determining whether as an exercise of the Commonwealth's power of eminent domain, it conforms with the due process requirements of the Fourteenth Amendment with respect to the deprivation of plaintiffs' right of access to the parkway.

We begin with general principles.

"As a general rule, the exercise of the power of eminent domain that is, the taking of private property for public use, is subject to the constitutional right of the owner of the property taken to just compensation, regardless of the manner in which the property is appropriated, or whether it is used for the purposes for which it is taken." 29 C.J.S. Eminent Domain §97; see also, 12 Am. Jur. Constitutional Law §658.

"The constitutional guaranty as to just compensation for property taken for public use is paramount to any statute, and a statute not in keeping with such guaranty is unconstitutional." 29 C.J.S. Eminent Domain §98.

"A statute authorizing an exercise of the power of eminent domain is inoperative and will not support condemnation proceedings unless it provides for certain and reasonably prompt compensation to the owner of the property taken . . ." 29 C.J.S. Eminent Domain §99. (emphasis supplied)

"While the manner in which payment is to be made is ordinarily within the province of legislative discretion, the method of compensation prescribed must be such as to preserve inviolate to the owner absolute assurance of compensation before he is required to surrender possession of his property." 29 C.J.S. Eminent Domain §99. (emphasis supplied)

In §8 it is provided that owners of private property such as plaintiffs "... shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken." If the Legislature meant to identify or equate the term "property" with "land", it seems quite clear that it intended to deprive the plaintiffs of compensation for the loss of the incorporeal property right of ingress or egress to, from or across a limited-access highway.

We have referred to the Pennsylvania Legislative Journal for help in determining precisely what the Pennsylvania Legislature intended when it provided that the Commonwealth would not be liable for consequential damages "where no property is taken" in the designation of an existing highway as a limited-access highway, but we find the journal devoid of all discussion or information in this regard.<sup>9</sup>

Decisions of the Pennsylvania Supreme Court dealing with the liability of the Commonwealth for damages in road cases have denied compensation for damages which occur where there is less than the actual and physical taking of land or ground for the construction or improvement of a highway.

In *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 Atl. 309, 310 (1932), where no land was taken, the Supreme Court of Pennsylvania denied compensation for the impairment of access and deprivation of light sustained by the plaintiff as the result of the erection of a bridge by the Commonwealth in the center and within the

<sup>9</sup> See Vols. III and IV, Pa. Legislative Journal, 1945.

boundary lines of a street on which the plaintiff's property abutted.

In *Brewer et ux., Appellants v. Commonwealth*, 345 Pa. 144, 27 A. 2d 53 (1942), the Pennsylvania Supreme Court denied a plaintiff whose land abutted a highway compensation for damages sustained as the result of a change of grade where no land belonging to the plaintiff was physically taken.

In *Heil v. Allegheny County*, 330 Pa. 449, 199 Atl. 341 (1938), a state highway on which plaintiff's land abutted was relocated, but since none of the plaintiff's land was taken or seized in the relocation, he was denied damages resulting from the diminution of the value of his land resulting from the diversion of the traffic.

The theory in the earlier decisions was again given support in the case of *Koontz v. Commonwealth*, 364 Pa. 145, 70 A. 2d 308, 309 (1950), where the Supreme Court of Pennsylvania said:

"It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law . . . for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land . . ."  
(emphasis supplied)

In a more recent decision of the Superior Court of Pennsylvania, *Moyer v. Commonwealth*, 183 Pa. Super. 333, 132 A. 2d 902 (1957), the court specifically held that the impairment of a landowner's ingress and egress to a highway resulting from its relocation 30 feet away, and the building of fill in front of the landowner's property,

without the taking of land, was not compensable under the Pennsylvania "State Highway Law".<sup>10</sup>

Interpreting the statute in the light of the foregoing cases,<sup>11</sup> we conclude that the Pennsylvania Legislature did not intend to compensate those abutting land owners whose land is not physically taken, but whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway.<sup>12</sup> For that reason, we think the statute is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We are especially persuaded to this conclusion by the fact that § 8 of the statute provides that damages for the taking of property for limited-access highways in townships and boroughs, as here, shall be paid in the same manner as now provided by law, to-wit, the "State Highway Law". That law, as construed by *Koontz v. Commonwealth, supra*, and *Moyer v. Commonwealth, supra*, does not impose liability on the Commonwealth for damages where no land is taken.<sup>13</sup>

<sup>10</sup> *Supra*, f.n. 4.

<sup>11</sup> It would necessarily follow from the decision in *Doud v. Hodge, supra*, at p. 487, that in the absence of a construction of a state statute by the State Courts, this court may construe the statute in order to determine its federal constitutionality. Cf. *Verluis v. Town of Haskell, Okla.*, 154 F. 2d 935 (10th Cir. 1946); *Virginia Surety Co. v. Knoxville Transit Lines*, 135 F. Supp. 606 (E.D. Tenn. 1955); *Day v. North Am. Rayon Corp.*, 140 Supp. 490 (E.D. Tenn. 1956).

<sup>12</sup> Cf. the Pennsylvania "Statutory Construction Act", 1937, May 28, P. L. 1019, art. I, § 1 et seq., as amended, 46 *Purdon's Pa. Stat. Ann.* § 501 et seq., especially §§ 551, 552(4) with regard to ascertaining the intent of the Legislature in the enactment of a law.

<sup>13</sup> The federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state. *Georgia*



Moreover, we have found no other general law of Pennsylvania which, under accepted principles,<sup>14</sup> could be read in conjunction with the present statute so as to make the payment of compensation to the plaintiffs possible.

The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a "severability clause" (§15, 36 *Purdon's Pa. Stat. Ann.*, §2391.15).<sup>15</sup> However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account.

#### *Six Per Cent Argument*

To bolster their argument that the plaintiffs are not entitled to any compensation from the Commonwealth for the taking of their right of access to the parkway, the defendants advance a further interesting theory to the effect that historically in Pennsylvania the land taken for roads and highways is regarded a little differently than land taken for other public uses because in the original grants

*Ry. & Electric Co. v. City of Decatur*, 295 U. S. 165 (1934); *Burns Mortgage Co. v. Fried*, 292 U. S. 487 (1934); *Hartford Accident & Indemnity Co. v. Nelson Co.*, 291 U. S. 352 (1934); *United States ex rel. Touhy v. Ragen*, 224 F. 2d 611 (7th Cir. 1955), *cert. den.*, 350 U. S. 984; *McClaskey v. Harbison-Walker Refractories Co.*, 138 F. 2d 493 (3d Cir. 1943).

<sup>14</sup> Cf. *In re Sharret's Road*, 8 Pa. 89 (1848); see also cases cited in 29 C.J.S. *Eminent Domain* §99, fn. 96.

<sup>15</sup> Even if the statute did not contain a severability clause, the Pennsylvania Statutory Construction Act, §55, 46 *Purdon's Pa. Stat. Ann.* §555, which provides for severability generally in any statute would apply.

or patents from the Commonwealth, there were contained reservations to the Commonwealth of 6 acres out of every 100 acres for roads, and the Legislature may so use the land reserved without paying the value of it to the grantee, his heirs or assigns. See: *Plank-Road Company v. Thomas*, 20 Pa. 91, 93. (1852); *Workman v. Millin*, 30 Pa. 362 (1858); *Township of East Union v. Comrey*, 100 Pa. 362 (1882); *Herrington's Petition*, 266 Pa. 88, 109, Atl. 791 (1929). See also, 35 Dick. L. R. 192 (1931) for an interesting historical discussion of this rule.

Though the defendants' argument appears plausible, we cannot subscribe to it as sufficient cause for holding that these plaintiffs are not entitled to any compensation for the taking of their existing right of access to the parkway.

We cannot believe that the original grantors ever envisaged limited-access highways, but rather were concerned equally with the construction of roads for the benefit of the land owners as well as the public using the road. We believe this sentiment is expressed in an early case alluding to the rule, *McClenahan v. Currie*, 3 Yeates (Pa.) 363 (1802), where the court said at pages 372-373:

"Although in this early arrangement, there might be a chance that certain purchasers might be obliged to contribute more than the 6% to the roads, yet it might possibly have been foreseen, that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements."

The so-called "Six Per Cent Rule", when closely scrutinized, is essentially based on a contractual relation-

ship, the plaintiffs' original predecessors in title having received, in the form of the additional 6 acres, consideration for the right of the Commonwealth to later use the additional acreage for roads. However, we believe that the original agreements did not encompass a situation whereby the original patentees or their privies would be deprived of access to any road so built, and for this reason we can only conclude that the plaintiffs through their predecessors in title have never been compensated in any form for the particular right of which the defendants now seek to deprive them. The point we are developing is that contractually the original patentees, or their privies, the plaintiffs, have never received consideration for their being deprived of access to a road constructed on the reserved acreage.

Although it might be argued that restricting access is actually using "property" for road purposes, the original reservation seems to apply only to land actually used for road construction and to unimproved land, *Plank-Road Co. v. Thomas, supra*, at page 94. These are additional matters taking this present set of facts out of the operation of the rule.

### CONCLUSION

For the foregoing reasons we believe the complete deprivation of the plaintiffs' present right of access to the Airport Parkway would constitute a "taking" by the Commonwealth under its power of eminent domain for which the plaintiffs should be compensated in money damages. We do not consider the complete deprivation by law of the right of access as being within the principle of "damnum absque injuria".

Since the "Pennsylvania Limited Access Highway Act" in its present form, as we construe it and as counsel for the defendants argues, denies the plaintiffs compensation for the proposed taking, the defendants should be permanently enjoined from enforcing it over the plaintiffs' protest.

In arriving at this conclusion, we need not consider the further arguments advanced by plaintiffs, namely, that the statute denies them equal protection of the laws because the Pennsylvania Turnpike Act permitting the Pennsylvania Turnpike Authority to take land for the construction of the Turnpike provided for the payment of consequential damages;<sup>16</sup> and that the Commonwealth is estopped from denying damages to the plaintiffs for the destruction of their right of access because when its political subdivision, the County of Allegheny, originally condemned the property in quo, the County obtained a reduction in the damages otherwise payable to the plaintiffs because of the benefits they would derive from the right of access to the parkway after it was constructed. Neither need we consider the plaintiffs' argument with regard to the impairment of obligation of contract.

An appropriate order will be entered permanently enjoining the defendants from enforcing the statute against the plaintiffs.

<sup>16</sup> Also under the proviso in §8 it appears that some abutting property owners may in some circumstances secure compensation for consequential damages while others may not.



## FINAL DECREE

This cause having come to be heard on December 2, 1955, February 13, 1956, March 22, 1956, February 12, 1957, and November 18, 1957, before a duly constituted district court of three judges, convened pursuant to Title 28 U.S.C. §§2281, 2284, and all parties being represented by counsel, and the cause, by agreement of all parties, having been submitted upon final hearing, upon the pleadings, stipulations of the parties, oral argument, briefs of counsel for the parties, and the complete record of the proceedings, and this court having duly made its findings of fact and conclusions of law in the opinion filed herewith;

NOW, THEREFORE, IT IS FINALLY DETERMINED, ORDERED, ADJUDGED AND DECREED that the defendants, Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and they hereby are permanently enjoined from enforcing or otherwise complying with the Pennsylvania "Limited-Access Highways Act", 1945, May 29, P. L. 1108, §1, et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq., so as to interfere with or deprive the plaintiffs of their right of ingress or egress to, from or across the "Airport Parkway" in Allegheny County, Pennsylvania.

(s) AUSTIN L. STALEY  
*Circuit Judge*

(s) JOHN L. MILLER  
*District Judge*

(s) RABE F. MARSIL  
*District Judge*

March 19, 1958.

**APPENDIX "B"**

**LIMITED ACCESS HIGHWAYS  
AN ACT**

Authorizing the establishment, construction and maintenance of limited access highways and local service highways; and providing for closing certain highways; providing for the taking of private property and for the payment of damages therefor; providing for sharing the costs involved and for the control of traffic thereover; providing penalties, and making an appropriation.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. A local service highway is defined as a public highway, either existing, or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway.

Section 2. (a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare

any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway.

(c) The authorities of any political subdivision of the Commonwealth are hereby authorized to declare any existing or new highway, or part thereof, now or hereafter under their jurisdiction and control, to be a limited access highway and to construct and maintain the same.

(d) The designation of a limited access highway in a city by either the Secretary of Highways or by the commissioners of the county in which the city is located shall be subject to the approval of the city as evidenced by an ordinance duly passed in accordance with the law. Such approval by a city shall in no way impose any liability upon the city for property damages occasioned by the designation of a limited access highway.

Section 3. The Secretary of Highways with the approval of the Governor, or local authorities in connection with the designation or construction of a limited access highway may lay out or construct local service highways. Such local service highways shall be so located as to permit the establishment by private owners or their lessees of adequate fuel and other service facilities for the users of limited access highways. The location of such facilities may be indicated to the users of the limited access high-

ways by appropriate signs, the size and location of which shall be determined by the authorities having jurisdiction. No commercial enterprise or activity shall be located or authorized by the State or by any political subdivision thereof, within or on any public property which is part of the right of way of any limited access highway.

Section 4. In the establishment or construction of limited access highways, the authorities responsible therefor shall have the power to eliminate intersections at grade with other highways by the construction of grade separation structures, by the closing of such intersecting highways at the right of way lines of the limited access highway, or by relocating such intersecting highways as in their discretion will best serve the public interest.

Section 5. Where the Secretary of Highways proceeds under the authority of this act, he shall have authority to construct and maintain any tunnel, bridge, culvert, drainage structure or other structure or appurtenances incidental thereto, other than sanitary sewers, as may be necessary in the construction of the limited access highway: Provided, however, That the Secretary of Highways shall have authority to replace, reconstruct or restore existing sanitary sewers.

Section 6. The establishment of a limited access highway or a local service highway by the Secretary of Highways, as herein provided, shall be by a plan approved by the Governor and filed in the office of the recorder of deeds of the proper county, at the expense of the county. The establishment of a limited access highway or a local service highway by the authorities of any political subdivision of the Commonwealth, as herein provided shall be in the same



manner as now or hereafter provided by law for the opening, widening or relocating of highways by such political subdivision.

Section 7. After the establishment of a limited access highway it shall be unlawful to establish or lay out any new highway intersecting the limited access highway except by and with the consent of the authorities responsible for the limited access highway.

Section 8. For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the au-

thorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivision in which such highway is located.

Section 9. The authorities responsible for the maintenance of limited access highways shall have exclusive jurisdiction over the control of the use of such highways, and, by the erection of appropriate signs, may control the ingress and egress of vehicles thereto, therefrom and across, and the parking and speed of vehicles thereon, or may exclude any class or kind of traffic therefrom, and, by the erection of signs or the construction of curbs, painted lines, or other physical separations, provide separate traffic lanes for any class of traffic or type of vehicle: Provided, however, That nothing herein contained shall restrict the authority or jurisdiction of any peace officer as defined in: The Vehicle Code from enforcing such control over traffic or parking as have been or may be established for limited access highways: And provided further, That the provisions of The Vehicle Code not superseded by the provisions of this act shall be and remain in full force and effect for the use and operation of motor vehicles on limited access highways. It shall be unlawful for any person to violate any parking or speed restriction or traffic control established for a limited access highway as provided herein, and any person violating such restriction or control shall, in a summary proceeding, be subject to a fine of not less than five (\$5) dollars nor more than twenty-five (\$25) dollars and costs of prosecution, or imprisonment for one day for each dollar of fine and costs remaining unpaid.

Section 10. Maintenance of a limited access highway shall include the removal of snow, the maintenance of

curbs, shoulders, ditches and slope areas and may include the lighting of the highway or any part thereof and the planting and trimming of trees, grasses, shrubs and vines on the right of way or slope areas.

Section 11. It shall be lawful for any political subdivision of the Commonwealth to make a contribution to the Department of Highways toward the cost of the establishment or improvement of a limited access highway or local service highway by the Department of Highways or toward the cost of maintenance of a limited access highway by the Department of Highways. It shall be lawful for any county and any of its political subdivisions to enter into agreements for the sharing of any or all costs of the establishment or improvement of limited access highways and local service highways.

Section 12. Local service highways constructed under authority of this act shall, upon completion of construction, be maintained by and at the expense of the political subdivision in which they are located.

Section 13. Except as herein provided, the powers granted under the provisions of this act shall not change, alter or diminish any authority or right now or hereafter vested by law in the Secretary of Highways or the officials of any political subdivision of the Commonwealth relating to highways.

Section 14. So much of the money in the Motor License Fund as may be necessary from time to time is hereby specifically appropriated to the Department of Highways for carrying out the provisions of this act. The political subdivisions of the Commonwealth are authorized to provide funds for the establishment, construction or

maintenance of limited access highways or local service highways in the same manner as now or hereafter provided by law for the improvement or maintenance of highways.

Section 15. The provisions of this act are severable, and if any of its provisions shall be held to be unconstitutional by any court of competent jurisdiction, the decision of the court shall not affect or impair any of the remaining provisions of this act.



**APPENDIX "C"**

SOHN, J., December 17, 1956.—Plaintiffs have filed a class complaint in equity asking this court to decree that the Act of May 29, 1945, P. L. 1108, as amended, 36 PS §2391.1, et seq., contravenes and violates the Constitution of Pennsylvania and the Constitution of the United States. The act in question is the one more familiarly known as The Limited Access Highway Act. Plaintiffs further request that we restrain the Governor of the Commonwealth of Pennsylvania and the Secretary of Highways of the Commonwealth of Pennsylvania from declaring the highway extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport in Allegheny County, Pa. known as the "Airport Parkway" to be a limited access highway and from interfering with direct ingress and egress between plaintiffs' property and the said highway, pending hearing of the issue. They also ask that defendants be forever enjoined from said declaration and said interference.

Defendants have filed preliminary objections to plaintiffs' complaint in equity. Specifically, those objections are: (1) The complaint fails to state a cause of action; (2) plaintiffs have an adequate remedy at law; (3) this court (The Dauphin County Court) is without jurisdiction to grant the relief sought by plaintiffs.

Exhaustive briefs have been filed by counsel on both sides of the case and detailed argument was held before the Dauphin County Court. The greater part of the argu-

ment has been directed to the various constitutional questions raised, and the act itself has been assailed for those reasons. As the complaint indicates, there is at present pending in the United States District Court for the Western District of Pennsylvania an equity suit between the same parties and involving the same issues. That case is listed as Creasy et al. v. Lawler et al., civil action No. 13672. The same relief is asked in this last named case as in the case at bar. The district court has entered a temporary restraining order against the defendants. The suit now before us was instituted because the Federal judges have been unwilling to render a decision until the statute under attack has been first interpreted by the State courts.

Plaintiffs, who claim they are the owners of land and various business properties abutting upon the highway in question, are fearful that their alleged right of ingress and egress will be taken from them without compensating them therefor. They claim that as abutting property owners they have a right of direct access to the presently free-access Airport Parkway, and that this right is a property right which cannot be taken from them without the payment of just compensation. They allege that if their direct access to the Airport Parkway is cut off they will not receive any compensation for the loss of their property.

On the other hand, defendants maintain that plaintiffs are seeking to have the Dauphin County Court, sitting in equity, substitute itself for the board of viewers which is established by the provisions of the very act itself. In effect, plaintiffs ask this court to determine whether or not a taking of property has occurred and what damages shall be awarded therefor, and that, if the depriving them of access is found to be a taking of a compensable property.

right, that plaintiffs' legitimate interests will be constitutionally safeguarded by a resort to viewers proceedings and, if necessary, by later appeals to the courts.

We believe that out of the many questions raised in this case there is only one which this court is called upon to decide; namely, Do plaintiffs have an adequate remedy at law by which they may litigate their right to recover from the Commonwealth any and all of the rights which they claim to be theirs if the present Airport Parkway is declared to be a limited access highway? Our answer must be in the affirmative.

Plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation of authority to support it. At all times plaintiffs can rely on the provisions of the Constitution of Pennsylvania, article I, sec. 10, that no private property shall be taken or applied to public use "without just compensation being first made or secured". Neither do plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. Plaintiff's main attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway *without compensation*. What the property owners here are asking this court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is *constitutionally* required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of plaintiffs' rights can

be protected and secured in a proceeding before viewers, as is provided in section 8 of The Limited Access Highway Act of May 29, 1945, P. L. 1108, as amended, 36 PS §2391.8.

The Supreme Court of Pennsylvania has made it indisputably clear, that a Pennsylvania court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See *Gardner v. Allegheny County*, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the legislature, in the Limited Access Highways Act, supra, has provided a way in which, every property owner may have it decided whether he is entitled to compensation and, if so, when, for what, and in what amounts. Where the legislature has provided a way and a remedy, it becomes the exclusive remedy available: *Hastings Appeal*, 374 Pa. 120 (1953); section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, 46 PS §156. For a late case see *Jacobs v. Fetzer*, 381 Pa. 262 (1955).

It is not for this court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the common pleas court and a jury trial, and still later to have their rights adjudicated in the appellate courts. At all times their constitutional rights, whatever they may be, will be guarded and protected.

J



There being a full, complete and adequate remedy at law, of which all plaintiffs can avail themselves, we, therefore, make the following

### ORDER

And now, to wit, December 17, 1956, defendants' preliminary objections to the complaint are hereby sustained, and the said complaint is dismissed at plaintiffs' cost.

**APPENDIX "D"**

*Creasy, Appellant v. Lawler*, 389 Pa. 635 (1957).

Opinion Per Curiam, June 28, 1957:

Order affirmed on the opinion of Judge Walter R.  
Sohn, reported in 8 D. & C. 2d 535.

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**IN THE**  
**Supreme Court of the United States**

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**NO. 157 OCTOBER TERM, 1958**

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**LEWIS M. STEVENS, Successor to Joseph Lawler as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania and GEORGE M. LEADER, Governor of the  
Commonwealth of Pennsylvania, Appellants**

**v.**

**J. K. CREASY, WILLIAM W. McNAMEE, FRANK  
RANALLO, A. W. TUICCILLO, ED KLEEMAN and  
R. G. CUMMISKEY, on Behalf of Themselves and Other  
Property Owners and Leasees Similiarly Situated,  
Appellees**

**and**

**JACK C. MARSHELL and ALICE E. MARSHELL,  
Appellees**

---

**On Appeal From the United States District Court for the  
Western District of Pennsylvania.**

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**MOTION TO AFFIRM**

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IN THE  
**Supreme Court of the United States**

**NO. 157 OCTOBER TERM, 1958**

**LEWIS M. STEVENS**, Successor to Joseph Lawler as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania and **GEORGE M. LEADER**, Governor of the  
Commonwealth of Pennsylvania, Appellants

v.

**J. K. CREASY**, **WILLIAM W. McNAMEE**, **FRANK  
RANALLO**, **A. W. TUICCILO**, **ED KLEEMAN** and  
**R. G. CUMMISKEY**, on Behalf of Themselves and Other  
Property Owners and Lessees Similiarly Situated,  
Appellees

and

**JACK C. MARSHELL** and **ALICE E. MARSHELL**,  
Appellees

On Appeal From the United States District Court for the  
Western District of Pennsylvania.

**MOTION TO AFFIRM**

I.

**MOTION**

AND NOW, Appellees, plaintiffs below, by their coun-  
sel, **A. E. KOUNTZ** and **EDWARD P. GOOD**, respectfully  
move this Honorable Court to affirm the judgment of  
the Court below on the ground that it is manifest that  
the questions on which the decision of the cause depend  
are so unsubstantial as not to need further argument.

*Statement.***II.****STATEMENT**

In August, 1955, informal announcements were made by the Department of Highways of the Commonwealth of Pennsylvania of the intention of the Secretary of Highways of the Commonwealth to assume control of a five-mile section of highway, commonly known as the Airport Parkway, in Allegheny County, Pennsylvania, originally constructed and then and at the present time owned and maintained by Allegheny County, for the purpose of converting that section of the highway to a limited access or non-access highway.

The section of the road in question was built in 1949; the right-of-way therefor was obtained by purchase or by condemnation from the owners of the land. Many of the said owners retained abutting land and are among appellees herein. Other appellees have purchased abutting properties since the construction of the highway and still others are tenants on properties abutting the highway.<sup>1</sup>

If plaintiffs are barred from access to the highway, the effect would be the eviction of some plaintiffs from their homes. For others, it would mean complete loss of large investments of money, effort and time; for example, some plaintiffs own and operate gasoline stations; others, a restaurant and an amusement park. None of these establishments could be reached by automobile if access to and from the highway is barred.<sup>2</sup>

1. Opinion of the Court below: Jurisdictional Statement, Appendix "A", page 24.
2. Opinion of the Court below: Jurisdictional statement, Appendix "A", pages 22-24.

### *Statement.*

This threatened conversion of the highway would have been pursuant to the provisions of an Act of Assembly of the Commonwealth of Pennsylvania of 1945 (May 29 P. L. 1108, Sec. 1, et seq., as amended, 36 (Pa.) Purdons Statutes Sec. 2391.1 ff.)

It appeared to plaintiffs at the time of the announcements aforesaid that under the terms of that statute, considered together with other statutes and the decisional law of Pennsylvania, their loss of access was not to be compensated for; accordingly, they entered the District Court for the Western District of Pennsylvania, under the authority of 28 U.S.C.A. Sec. 2281 and Sec. 2284, for an injunction. The Three-Judge District Court initially stayed proceedings and directed plaintiffs to seek a construction of the statute and to test their rights before the Courts of Pennsylvania. Accordingly, plaintiffs brought a substantially identical complaint and prayer for injunction against defendants in the Court of Common Pleas of Dauphin County. That Court held that plaintiffs were not entitled to equitable relief and said that they should wait until after condemnation before seeking damages. That Court did not decide whether or not plaintiffs would be entitled to such damages.<sup>3</sup>

The Supreme Court of Pennsylvania affirmed without opinion<sup>4</sup>; thus the State Courts refrained from construing the statute but have expressed the view that appellees must wait until their right of access is destroyed and thereafter enter the Courts to discover at

3. The opinion of the Dauphin Court of Common Pleas is printed in the Jurisdictional Statement filed by Appellants, Appendix "C", page 52.
4. Jurisdictional Statement, Appendix "D", page 57.



### *Counter-Statement of Questions Presented.*

that time whether or not they have suffered compensable damages or *damnum absque injuria*.

Following the summary disposition of their case in the State Courts, appellees returned to the Three-Judge Court for relief and after further argument and testimony—jurisdiction having been conceded—that Court granted a permanent injunction on the ground that the statute authorizes the destruction of appellees' rights of access without providing compensation for such destruction and thus purports to deprive them of their property without due process of law<sup>5</sup>.

### III.

#### COUNTER-STATEMENT OF QUESTIONS PRESENTED

Appellees respectfully suggest that in the Jurisdictional Statement appellants have presented the questions on appeal in a somewhat inaccurate manner; in particular, questions 1 and 2 do not fairly present the situation. This Court should note that there was never any question in the minds of appellees or anyone else concerning the right of appellees or any other person ~~to seek~~ compensation from the Board of Viewers, as established by the general law of the Commonwealth of Pennsylvania, in any situation, whether covered by a particular statute or not, in which that person believes that he has suffered a loss because of a taking or condemnation by the Commonwealth or by any agency with the power of eminent domain. The obtaining of such compensation, however, is an entirely different matter. The question raised by appellees was rather whether or not the loss of access without the taking of land would

5. Jurisdictional Statement, Appendix "A", p. 26; p. 34 et seq.

### *Counter-Statement of Questions Presented.*

be compensable. That question the State Courts did not answer. Appellees vigorously deny, therefore, that the state courts have upheld the constitutionality of the statute.

Appellees believe that the questions would be more accurately stated as follows:

1. After the State Courts have declined to rule on the constitutionality of a state condemnation statute, may a Three-Judge Court enjoin the enforcement of the statute on grounds that it is unconstitutional and that if plaintiffs are required to seek relief in the State Courts after condemnation, they will suffer an irreparable loss?

2. After state courts have refused to construe a state statute, may a Three-Judge Court proceed to construe the statute according to the law of the state, determine that it is unconstitutional and enjoin its enforcement?

Appellees respectfully propose to this Court, in addition to the grounds expressed in the opinion of the District Court, other reasons<sup>6</sup> for affirming the opinion below, even though, strictly speaking, they may not be labeled "questions presented on appeal". The statute in question is clearly in breach of the protection by the Fourteenth Amendment against unlawful and arbitrary discrimination and the guaranty of equal protection of the laws. Furthermore, the record indicates that appellants are estopped from attempting to deprive appellees of their access to the highway.

6. Opinion of the Court Below, Jurisdictional Statement, Appendix "A", page 43. The Court below mentioned the grounds, but stated that it need not consider them in view of its conclusion that the injunction should issue on the ground set forth, in detail, in its opinion.

## Argument.

### IV.

## ARGUMENT

### Introduction

Although the instant appeal involves a large amount of money, it is not a case of national significance. The decision upon the grounds stated by the Court below is in accord with practically all recent authority in the United States.

#### *A. The Decision Below is Clearly Correct*

Although the particular problem involved in this appeal, the conversion of an existing general-access highway into a non-access freeway, is a novel one in the Commonwealth of Pennsylvania, it is not so on the national scene. The recent authorities on this problem are surveyed in the opinion of the Court below<sup>7</sup>. In one of the articles mentioned in the opinion, "Freeways and Rights of Abutting Owners", 3 *Stanford Law Review*, page 298, February, 1951, the following statement appears with reference to the problem of conversion of an existing highway into a freeway (at Page 302):

"Without more, the damage to the [abutting] property owner is so severe that the Courts have universally held that he is entitled to compensation. The public can only justify its act of completely shutting off land under the power of eminent domain."

Historically, although there are cases to the contrary, the general and universally accepted modern rule

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7. Jurisdictional Statement, Appendix "A", page 32.

### Argument.

is that access, being an incorporeal hereditament or an easement, is a property right and as such may not be condemned without compensation. *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 301-302; 26 S. Ct. 91; 50 L. Ed. 192 (1905); *U. S. v. Welch*, 217 U.S. 333, 30 S. Ct. 527, 54 L. Ed. 787 (1910).

To the knowledge of appellees, no jurisdiction of the United States has attempted to bar access of abutting owners to existing highways without compensating them therefor. The Court below construed the statute as providing for just such a deprivation and has therefore enjoined its enforcement. There can be little question as to the correctness of the construction by the Court below of the statute. Appellants have conceded as much.<sup>8</sup> A reference to the Pennsylvania decisions involving the destruction of access without the taking of land by the Commonwealth of Pennsylvania as distinguished from municipalities will reveal that in every instance the Courts of Pennsylvania have held that such destruction is not compensable. This line of decision established a dichotomy which presents a paradox in the law of the State of Pennsylvania. It is clear that when a municipality condemns access, the condemnation is always compensable. *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. 2nd 842 (1938); *Walsh v. Scranton*, 23 Pa. Superior Ct. 276 (1903); *Kane v. Aspinwall Delafield Company*, 289 Pa. 535, 137 Atl. 10 (1910); *Stewart v. Gimbel Brothers*, 285 Pa. 102, 131 Atl. 728 (1926). In these cases, the Courts of Pennsylvania have said that access is a property right which can no more be taken without compensation than can the property itself.

8. Jurisdictional Statement, page 14; Appendix "A", p. 43.



### Argument.

Nevertheless, when the same question has arisen under a condemnation by the Commonwealth itself, the Pennsylvania Courts have held that access is merely a consequential injury and as such is not compensable; *Soldiers & Sailors Memorial Bridge Case*, 308 Pa. 487, 162 Atl. 309 (1932); *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529, 115 A. 2nd 729 (1955); *Koontz v. Commonwealth*, 364 Pa. 145, 70 A. 2nd 308 (1950). Appellees respectfully submit that *the character of a property right cannot vary according to the identity of the condemnor.*

Although the Court below based its decision upon the ground that the statute does not provide for compensation for the deprivation of a property right, nevertheless, appellees urge that this Court consider other vices of the statute.<sup>9</sup> This Court's attention in particular is respectfully called to section 8 of the statute:<sup>10</sup>

"The Secretary of Highways shall have authority to enter into agreements for the sharing of the costs of property damages with the officials of any political subdivision of the Commonwealth which assumes such responsibility by proper resolution or ordinance."

As the lower Court said,<sup>11</sup> although the statute does not provide generally for compensation for the loss of access, it does direct that some favored abutters may be so compensated. Apparently the requirement would be

9. Jurisdictional Statement, Appendix "A", page 43.

10. Appearing on Page 48, Jurisdictional Statement, Appendix "B".

11. See footnote to opinion, page 43, Appendix "A" aforesaid.

that such abutters exercise sufficient political influence in the municipality in which their land lies. Their neighbors in adjoining municipalities without such influence may receive nothing for their loss of access. Such discrimination, from a constitutional standpoint, is indefensible and if for no other reason, the statute should be struck down under the aegis of the equal protection of the law; see *Colgate v. Harvey*, 296 U. S. 404, 50 S. Ct. 252, 80 L. Ed. 299 (1935); *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2nd. 1485, (1957).

This Court is also respectfully asked to compare the statute under consideration with the "Turnpike Act", the Act of Assembly of the Commonwealth of Pennsylvania of May 21, 1937, appearing in 36 Purdon's Pa. Statutes, Sec. 652, et seq. By that Statute the Turnpike Commission is authorized to acquire by condemnation, "lands, rights, easements, franchises, and other property . . .". There is no difference in law or in reason between the rights of property owners abutting the Pennsylvania Turnpike for whom the legislature provided compensation for the loss of access and the rights of the appellees in this case, abutting another four-lane highway identical in all practical respects to the Pennsylvania Turnpike.

Appellees should further like to call to the attention of the Court a question raised in the lower Court and briefly touched upon in the opinion filed in this case:<sup>12</sup>

"[At the time of original condemnation of the land for the construction of the Airport Parkway by Allegheny County] the Board of Viewers, when assessing damages to the property owners for their

<sup>12</sup> Jurisdictional Statement, Appendix "A", page 25.

## Argument.

land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new Parkway and the access thereto."

In Pennsylvania, a County is a political subdivision of the Commonwealth of Pennsylvania, and County officers act for and on behalf of the Commonwealth in their official capacities. *Commonwealth v. Walker*, 305 Pa. 31, 157 Atl. 340 (1931); *Pennsylvania Turnpike Commission Land Condemnation Case*, 347 Pa. 643, 32 A. 2d 910 (1943). Appellants now seek to destroy the benefits which, it was earlier claimed, would accrue to appellees and in effect, seek to expand the original condemnation without payment of further compensation. The principles of equitable estoppel are clearly applicable here over and above every other legal consideration in this case.

### B. *The Court below was Justified in Proceeding to a Final Determination.*

Appellants have cited *Alabama Public Service Commission v. Southern Railroad Co.*, 341 U.S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 (1951). However, this Court, in the very beginning of the opinion in that case, distinguished it from a situation such as the instant one in which the constitutionality of a state statute is before the Court. Very recently this Court has reaffirmed the right and duty of a District Court, where a state statute has not been construed by the courts of that state, to construe the act on principle or the weight of authority. *Doud v. Hodge*, 350 U.S. 485, 76 S. Ct. 491, 100 L. Ed. 577.

### Argument.

(1956). It must be remembered, too, in the instant case, that the District Court, as we have previously mentioned, fulfilled every obligation of comity and policy in that it construed the act only after referring the case to the State Courts and after refusal by the "Commonwealth Court" in Dauphin County and by the Supreme Court of Pennsylvania to answer the question upon which the entire case turns.

Even if the Courts of Pennsylvania had squarely met the question of constitutionality, however, and had decided that appellees had no constitutional right to compensation for the loss of access to the Parkway, the District Court could still have reached the decision that it did. *Morey v. Doud*, supra; *Webb v. Southern Railway Co.*, 248 Fed. 618 (1918) cert. den. 247 U.S. 518, 38 S. Ct. 582, 62 L. Ed. 1245.

#### C. *The Decision of the District Court was Timely*

There certainly was nothing startling or novel in the decision of the District Court to enjoin the enforcement of a statute construed by it to be unconstitutional on the ground that, although appellees, following condemnation, could enter the State Courts and then seek review by this Court, the hardship involved rendered the case one peculiarly within the jurisdiction of equity. *Toomer v. Witsel*, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The right of a land owner to enjoin enforcement of a statute is especially clear in a case involving eminent domain, as is demonstrated by the authority cited by the Court below in 29 Corpus Juris Secundum, Eminent Domain, §§ 97, 98 and 99<sup>13</sup>. In the case

13. Opinion of the District Court, Jurisdictional Statement, Appendix "A", page 36.



at bar, condemnation would evict many appellees from their homes or in the alternative expose them to the hazards of remaining in residences from which access to the highway for ambulances and fire trucks, as well as ordinary vehicles, would be prohibited. *Smith v. Shiebeck*, 180 Md. 412, 24 A. 2nd 795, (1942) As a general proposition of equity, a property owner should be entitled to an injunction when a serious question of constitutionality arises concerning a condemnation statute, pending resolution of that question: *Jahr, Law of Eminent Domain*, page 435; 2 *Lewis on Eminent Domain*, 2nd Ed., page 1351 and cases cited therein; *Del Monte Livestock Co. v. Ryan*, 133 Pac. 1048 (Colorado) (1913). In this situation, the District Court could have done nothing else but enjoin appellants.

Appellants in the instant case take the position that they should be allowed to condemn access before the question of compensation is adjudicated. They have argued that at that time, the Courts then should find that appellees are not entitled to damages, but they have suggested that "of course, a misinterpretation . . . of the Fourteenth Amendment's requirement of compensation would be subject to Federal review."<sup>14</sup> In other words, appellants propose that the Three-Judge Court should refuse the injunction and that appellees' rights are sufficiently protected because, after condemnation, on a petition for certiorari to this court, the statute may eventually be decreed unconstitutional by this Court after plaintiffs have been evicted from their homes and their businesses have been destroyed.

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14. Jurisdictional Statement, page 10.

#### D. No Severance is Possible

Counsel for appellants, at page 13 of their Jurisdictional Statement, apparently being willing to concede that the statute is probably unconstitutional, at least in part, insist that the Three-Judge Court below should have severed the unconstitutional sections of the statute from the other sections and sustained the other sections. It is interesting to note, however, that they do not attempt to indicate at what point or points in the statute the surgical knife should be applied. It is clear that no one else would know that because the offending section 8 is obviously an entity. Furthermore, no dissection could cure the trouble here because the statute then would need new provisions which would assure compensation to appellees and those in similar situations in accordance with the principles set forth in the constitutional decisions, and the text book authorities, referred to by the Court below in its opinion (Appendix "A", attached to Jurisdictional Statement, page 36 et seq.). The provision for compensation in seizure cases must be "certain and reasonably prompt." 29 C.J.S. Eminent Domain, Sec. 99.

From C.J.S., Vol. 82, Sec. 93, subject "Statutes," we quote:

"Sustaining the constitutional part while the unconstitutional part falls has been held possible only where it is not necessary to insert words or terms to separate the constitutional part and give effect to it alone . . ."

*Conclusion.***CONCLUSION**

Appellees respectfully submit, for the foregoing reasons, that appellants present no substantial question for the decision of this Court and that the judgment and decree of the District Court should be affirmed.

A. E. KOUNTZ

EDWARD P. GOOD,

(Attorneys for Appellees)

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Office Supreme Court, U.S.

FILED

JAN 9, 1959

JAMES E. LUDWIG, Clerk

IN THE  
**Supreme Court of the United States**

October Term, 1958  
No. 157

LEWIS M. STEVENS, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania,

*Appellants*

J. K. CREASY, WILLIAM W. McNAMEE, FRANK BAXALLO, A. W. TUICCHIO, ED KLEEMAN and R. G. CUMMISKEY, on Behalf of Themselves and Other Property Owners and Lessees Similarly Situated, and JACK C. MARSHALL and ALICE E. MARSHALL,

*Appellees*

*On Appeal from the United States District Court for the Western District of Pennsylvania.*

**BRIEF FOR APPELLANTS**

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A. To prevail, Appellees must establish that an abutter's enjoyment of unlimited highway access is a property right and that the restriction thereof by governmental regulation constitutes a "taking" in the constitutional sense

B. Appellee's enjoyment of unlimited highway access is not a property right

1. An abutter's right of access does not exist as against the right of the public to the most efficient use of a public road for public travel

2. Any right of access which appellees may have can be conserved by the establishment of local service roads

3. Any property right which appellees may have is nevertheless subject to the Commonwealth's six-percent reserve interest

C. Restriction of highway access by governmental regulation does not constitute a "taking" in the constitutional sense

1. The limiting of appellees' highway access will serve to promote the public safety and welfare

2. Highway regulations are particularly encompassed within the police power of the state

3. Since governmentally erected physical impediments to access have been uniformly held not to consti-

tute a "taking" in the constitutional sense, the same result should be reached where substantially the same effect is produced by governmental regulation. 50

IV. A Pennsylvania Statute Providing for the Limiting of Access to a Public Highway, Without Liability on the Part of the State for Payment of Consequential Damages in the Absence of a Taking of Property, Does Not Deprive an Abutting Landowner or Tenant of His Property Without Due Process of Law or Deny Him the Equal Protection of the Laws or Impair the Obligations of His Contracts 56

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 157

LEWIS M. STEVENS et al.,

*Appellants*

vs.

J. K. CREASY et al.,

*Appellees*

*On Appeal From the United States District Court for  
the Western District of Pennsylvania.*

**BRIEF FOR APPELLANTS**

**OPINION BELOW**

The opinion of the District Court (R. 85-104) is reported at 160 F. Supp. 404.

**JURISDICTION**

These actions were brought to have the Pennsylvania Limited Access Highways Act declared unconsti-

tutional and to enjoin appellants from enforcing the statute as to appellees. They were heard and determined by a three-judge district court in accordance with 28 U.S.C. §§2281 and 2284. The final decree of the District Court was entered on March 19, 1958 (R. 104). The notice of appeal was filed on May 9, 1958 (R. 105-8). Probable jurisdiction was noted on October 13, 1958 (R. 108). The jurisdiction of this Court rests on 28 U.S.C. §§1253 and 2101(b).



**STATUTE INVOLVED**

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The statute involved is the Pennsylvania Limited Access Highways Act of May 29, 1945. It may be found in the 1945 volume of the Pennsylvania Pamphlet Laws at pages 1108 to 1112 with amendments in the 1947 volume at pages 481 to 483 and the 1957 volume at page 234. It may also be found in Title 36 of Purdon's Pennsylvania Statutes Annotated (Pocket Part) §§2391.1 to 2391.15. The entire statute is set forth in Appendix A hereto. Section 8 of the act, which was specifically challenged by appellees (R. 12-13) and found unconstitutional by the court below (R. 99-101), reads as follows:

"For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway

or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the authorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivision in which such highway is located."

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## QUESTIONS PRESENTED

1. Did the district court err in exercising its equitable jurisdiction on the ground that otherwise appellees would suffer irreparable injury, where the injury relied upon would stem from appellants' proposed action which the district court conceded to be valid and where the state courts previously had affirmed the availability of a recognized statutory proceeding in which appellees' rights could be determined and protected?

2. Did the district court err in enjoining enforcement of all provisions of a Pennsylvania statute which authorizes the limiting of access to a public highway on the ground that it precludes the payment of damages to abutting property owners, where the highest court of Pennsylvania had previously held that the statute provides both a means and a right to recover whatever damages an abutting property owner is constitutionally entitled to receive?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting landowner or tenant, where no land is taken, for his loss of access resultant from the conversion of an unlimited access highway to a limited access highway?

4. Does a Pennsylvania statute providing for the limiting of access to a public highway, without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting landowner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

## STATEMENT OF THE CASE


On August 1, 1955, and subsequently, appellees filed, in the United States District Court for the Western District of Pennsylvania, complaints (R. 10-15) seeking equitable relief against appellants. Jurisdiction was based on 28 U.S.C. §1331. Specifically, it was alleged that appellants were about to designate the "Airport Parkway," a public highway in Allegheny County, Pennsylvania, a limited access highway (the effect of which would be to limit ingress and egress to, from and across the highway to points specifically designated by appellant Secretary of Highways); that such designation would deprive appellees, who were abutting property owners and tenants, of their access to the highway; that the designation of limited access would be made under authority of the Pennsylvania Limited Access Highways Act of 1945 which precluded the payment of damages by the Commonwealth where no property was taken; that no damages would be paid to appellees for their loss of access since none of their land was being taken; and that, therefore, the statute was repugnant to the Constitution of the United States. Alleging that such action would cause them irreparable injury, appellees prayed for injunctive relief and for a decree that the Pennsylvania statute was unconstitutional.

Simultaneously with the filing of their complaint, appellees moved for and were granted, ex parte, a temporary restraining order. Thereafter, a three-



judge court was duly convened in accordance with 28 U.S.C. §§2281 and 2284. The initial proceedings resulted in stipulations as to the facts. Believing, however, that a construction of the statute by the state courts was desirable, the district court then entered an order staying proceedings pending such a determination and continuing the temporary restraining order (R. 66-68).

Pursuant thereto, appellees sought equitable relief from the state courts. Such relief was refused on the ground that, under the challenged statute, appellees had an adequate remedy at law by which all their rights would be protected (R. 71-74). Thereafter, the district court, finding that irreparable injury would be suffered by appellees during the time necessary to litigate the constitutionality of the statute in the state courts, granted a permanent injunction. The district court held that the enjoyment of access is a property right, that the deprivation of such access constitutes a taking of property for which compensation must constitutionally be paid, that the Pennsylvania statute does not provide for such compensation and that, accordingly, the act is in contravention of the due process clause of the Fourteenth Amendment to the United States Constitution (R. 84-94). This appeal followed.



## SUMMARY OF ARGUMENT

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Appellants here contend that the district court erred in determining that its exercise of equitable jurisdiction was necessary to prevent irreparable loss, in construing a state statute contrary to the definitive construction theretofore rendered by the highest state court, in refusing to sever what it found to be the single unconstitutional provision from the concededly valid remainder of the statute, in concluding that an abutter's enjoyment of access to a modern highway is superior to the public's right to the fullest utilization of that highway, and in holding that the limiting of such access by governmental regulation constitutes a taking for which the Fourteenth Amendment requires the payment of damages.

Appellants have never questioned, and do not now, question, the jurisdiction of the lower court. They only question whether this case presents an appropriate occasion for the exercise of that jurisdiction. The irreparable loss which is prerequisite to its exercise cannot exist in a vacuum; it must be related to and flow directly from action under an invalid statutory provision. The loss which the district court here found—the frustration of commercial opportunities—does not stem from the compensation provision which the court held to be constitutionally inadequate. It results from the limiting of access, an action which the district court conceded to be constitutional.

Furthermore, in basing the irreparability of appellees' loss on the time that would be consumed in litigating the constitutionality of the statute in the state courts, the district court ignored the fact that the constitutionality of the statute had already been established in state litigation between the parties to this case. Although the state courts in that equity action had no jurisdiction to pass upon the breadth of the compensation requirements of the federal and state constitutions, they clearly held that the statute afforded appellees both a procedural remedy by which they could test their right to damages and a substantive right to recover such damages as they might be constitutionally entitled to receive. Thereafter, the district court erroneously equated the existence of an uninterpreted constitutional requirement as to damages with the existence of an uninterpreted statute.

The state courts' decision that appellees' constitutional right to damages was fully guaranteed by the statute was binding upon the district court. Nevertheless, that court went off on an excursion of its own by interpreting the statute contrary to the authoritative state court interpretation. If the district court were correct in concluding that the Constitution requires Pennsylvania to compensate appellees for their loss of highway access, this statute, as construed by the state courts, likewise requires payment of such compensation. The district court's holding that this statute precludes payment to appellees of what is constitutionally required is thus in direct conflict with the binding construction rendered by the highest state court.

Notwithstanding its recognition that appellants could constitutionally limit access to the highway, the district court enjoined enforcement, as to appellees, of the entire statute. No justification for this action exists because this statute, as well as the Constitution of Pennsylvania, guarantees appellees payment of damages arising from a taking of their property for public use and, further, because the statute contains an express severability clause which has not been held inoperative by any state court.

Completely apart from considerations governing federal equity jurisdiction and general principles of comity, firmly established principles delineating the scope of the police powers of a state should have determined the instant case in favor of appellants. The authorities point clearly to the conclusion that impairment of road access by governmental regulation, like the accomplishment of a similar result through change of highway grade or interposition of physical obstruction, does not give rise to a valid claim to damages. Rights of access stem historically from conditions which do not obtain here; and, consequently, they properly belong outside the field of constitutionally compensable property interests.

Moreover, the district court's holding that access is a constitutionally protected property right treats all appellees as being landlocked by the proposed action. The court thus overlooks the statutory provision authorizing the establishment of local service roads to afford access to abutting property owners who would otherwise be without access. The impossibility of determining the actual effect which the limiting of



access would have upon the various appellees, together with the additional fact that Pennsylvania traditionally has retained a six percent interest in all land in the state for road purposes, re-emphasizes the desirability of relegating appellees to the statutory proceeding.

The statute in question does not purport to deny liability where property is taken. It merely provides that compensation shall not be paid for consequential loss in the absence of a taking of property. Under the decisions of this Court, the denial of damages for consequential loss does not subject the statute to constitutional objection. If the district court were correct in holding that the limiting of appellees' highway access constitutes a taking of property, this statute on its face requires the payment of damages therefor; and the interpretation given to the statute by the state courts in no way derogates from this obvious meaning.

Although appellees raised issues of estoppel, equal protection of the laws and impairment of the obligations of contract, the district court did not see fit to discuss these issues. We submit that the state cannot be estopped in the exercise of a governmental function and that the valid exercise here of the state's police power does not deny appellees the equal protection of the laws or impair their obligations of contract.

ARGUMENT

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I. THE DISTRICT COURT SHOULD HAVE DECLINED TO EXERCISE ITS JURISDICTION HERE BECAUSE THE IRREPARABLE INJURY WHICH IT FOUND WAS NOT RELATED TO THE STATUTORY PROVISION HELD UNCONSTITUTIONAL AND BECAUSE THE STATE COURTS PREVIOUSLY HAD AFFIRMED THE AVAILABILITY OF A RECOGNIZED STATUTORY PROCEEDING IN WHICH APPELLEES' RIGHTS COULD BE DETERMINED AND PROTECTED

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Appellants do not contest the jurisdiction of the district court. Their position is well summarized in the words of this Court in *Burford v. Sun Oil Co.*, 319 U. S. 315, 318 (1943):

“Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?”

The answer to this question depends on a multitude of factors impossible to delineate in a fashion generally applicable to every case in which the constitutionality of a state statute is challenged by a prayer for equitable relief addressed to a federal district

court.<sup>1</sup> The case at bar presents several complex aspects which should be outlined initially.

First, although the initial complaint might fairly be viewed as contesting appellants' right to deprive them of access to the highway, whether or not damages were paid, appellees clearly abandoned this broad assertion (Certified Record, Transcript of Pre-trial Hearing of December 2, 1955, pp. 21, 100-102)<sup>2</sup>; and the district court recognized the validity of state action to limit highway access (R. 94). In the district court's view the questions were simply whether the Fourteenth Amendment required damages to be paid to appellees for their loss of access and, if so, whether the statute comported with such a requirement. Thus, the state's power to construct or designate limited access highways is unquestioned; and nothing in the statute granting such power was held invalid.

Second, the holding of unconstitutionality involved two-step reasoning: (a) the deprivation of access to a highway is a "taking" of property in the constitutional sense for which compensation must be paid (R. 96); and (b) the Pennsylvania General Assembly intended the word "property" in §8 of the statute to mean "land" and did not intend to provide for compensation where no land was taken (R. 99-100).

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<sup>1</sup>At least one attempt has been made to isolate these factors from the cases in which this issue arose. See Hart & Wechsler, *The Federal Courts and the Federal System*, 885 (1953).

<sup>2</sup>The parties have filed with the Clerk of this Court a stipulation permitting reference to unprinted portions of the Certified Record.

The statute's language, granting damages only for an actual taking of property and denying liability for consequential damages where no property is taken, is unexceptionable on its face; thus, the above interpretation of the statute was prerequisite to the district court's conclusion.

Third, the requisite irreparable injury was premised upon the findings that, if access were limited, appellees' established businesses would be forced to close, some appellees would be unable to make any practical use of their lands because all access would be lost and some appellees would be deprived of opportunities to negotiate successfully sales or leases of their properties for commercial uses (R. 90). A refusal to exercise jurisdiction, stated the district court, would cause appellees to suffer substantial and possibly, unrecoverable losses during the time it would take to litigate the constitutionality of the statute in the state courts (R. 91). Nowhere, however, does the district court discuss the fact that these results would occur even if the statute provided for the payment of damages for appellees' loss of access and fully comported with the district court's view of the compensation requirements of the Constitution.

Fourth, although recognizing that a federal court should be reluctant to exercise jurisdiction where plaintiff's constitutional rights will be properly protected in the state courts and where the state statute has not been construed by the state judiciary, the district court, nevertheless, here determined to exercise its jurisdiction. It assigned as its reason that appellants would be irreparably injured during the



time necessary to litigate the constitutional issue in the state courts. In so doing, the district court, surprisingly enough, failed to note the fact that, at its own instance, the constitutionality of this very statute had already been litigated in the state court proceeding between the very parties to this action, with the result that the constitutionality of the legislation had already been upheld by the highest state court. When the parties then returned to the district court, the sole constitutional issue before the court was whether the statute, in guaranteeing the property owners a means of litigating their claims to damages and of obtaining such damages as they might be constitutionally entitled to receive, comported with the requirements of the Federal Constitution.<sup>3</sup> Consequently, the applicability of the principle invoked to the actual facts may be seriously questioned.

Fifth, despite a specific severability provision in the statute (§15) and the general severability requirement of Pennsylvania's Statutory Construction Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. §555, the district court struck down the entire statute because it believed that the act failed to provide a method for appellees to receive compensation (R. 100-1).

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<sup>3</sup>The extent of the district court's action becomes even more difficult to understand if reference is made to the certified Record, Transcript of Pre-trial Hearing of February 13, 1956, where in five separate places (pp. 17, 18, 23, 32-a and 33) Circuit Judge Staley said that, if the Pennsylvania statute was interpreted by the state courts so as to provide a remedy by which plaintiffs could test their right to damages in the state courts, the statute was constitutional and the federal court had no further jurisdiction.

Even though no dispute as to the Commonwealth's right to limit access exists, the result of this approach by the district court has been to prevent the Commonwealth of Pennsylvania from limiting access to the highway, and thus affording the public the advantages therefrom, for more than three years. This anomalous result is itself indicative of the error in the result reached by the district court.

As this Court has held, a showing of irreparable injury is necessary before a federal court will restrain enforcement of a state statute: *American Federation of Labor v. Watson*, 327 U. S. 582, 593 (1946); *Toomer v. Witsell*, 334 U. S. 385, 391 (1948). The district court apparently agreed with this view, but proceeded to find irreparable injury in a totally unique way. Its finding on this point is found in the following excerpt from its opinion: (R 90-1)

"We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer v. Witsell et al.*, 334 U. S. 385 (1948). If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all like

lihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses dependent on the continued right of access would be deprived of an opportunity to realize a successful completion [sic] of the negotiations.

"Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

"Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer v. Witsell*, supra, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities,

§9 of the statute, 36 Purdon's Pa. Stat. Ann., §2391.9."

Does *Toomer v. Witsell* support the position of the district court, or does it support the contrary conclusion urged by appellants? In that case an action was brought to enjoin as unconstitutional the enforcement of several South Carolina statutes which regulated commercial shrimp fishing off the coast of the state. One statute required non-resident shrimp boat owners to pay a license fee one hundred times the amount required of resident shrimp boat owners. Another required all licensed boats to dock at a port in the state and to unload, pack and stamp their catch before transporting it out of the state. Still a third conditioned the issuance of non-resident licenses on submission of proof that state income taxes had been paid on all profits from operations in the state during the preceding year. 334 U. S. 385, 389-91.

This Court noted that compliance with the first two statutes would require payment of large sums of money for which the state provided no means of recovery, that defiance would carry the risk of heavy fine and long imprisonment and that withdrawal from fishing until a test case was taken through the state courts (and possibly to this Court) would have resulted in a substantial loss of business for which no recompense could be obtained by the fish boat owners. As to the income tax statute, however, this Court found that no irreparable injury or lack of adequate remedy at law existed since the state provided a procedure whereby taxes paid under protest could be recovered and since no showing was made that the boat



owners' constitutional objections to the tax could not be raised under that procedure. 334 U. S. 385, 391-92.

The losses which the statute would have inflicted upon the boat owners in *Toomer v. Witsell* were all losses flowing from the application of the very statutory provisions which this Court held invalid. In contrast the losses which the district court found appellees in the present case would suffer are all losses which flow from the concededly valid application of state power to limit access. None of appellees' losses arise from the alleged denial of damages under §8 of the act. Were the statute to provide explicitly for the payment of damages to the present appellees, the injuries foreseen by the district court would still occur; yet, the total validity of the statute would then have been recognized by the district court; and the appellees would have been denied relief.

Despite the district court's apparent contrary interpretation in the case at bar, the gist of this Court's decision upholding the exercise of equitable powers in the *Toomer* case does not stem from a conclusion that relegation to the state tribunals to try the constitutionality of the statute would have subjected appellees there to irreparable harm. Admittedly, the appellees here could not proceed before a board of viewers prior to the limiting of access by the Commonwealth; but this kind of delay in providing for payment of any damages to which appellees may be entitled does not affect the statute's constitutionality. *Bailey v. Anderson*, 326 U. S. 203 (1945); *Joslin Manufacturing Company v. City of Providence*, 262 U. S. 668, 677 (1923); *Sweet v. Rechel*, 159 U. S. 380, 404-07 (1895).

The nub of the decision in favor of the exercise of equitable power in the *Toomer* case was that the irreparable injury flowed directly from the application of invalid statutory provisions. The suggestions that the complainants withdraw from fishing until a test case could be taken through the state courts clearly could not prevail where the loss of business could not be recouped were the statute to be held unconstitutional. The loss there arose directly from the invalidity alleged; the losses here would arise only as an incident of valid state action.

Had the district court held that the actual limiting of access here is beyond the power of the state, the problem presented would be entirely different. The irreparable injury would then arise from the invalid state action, and equitable relief would be proper. In such instance the principle of *Toomer v. Witsell* could properly be invoked to support the exercise of equitable jurisdiction. The district court did not so hold; in fact, it agreed (R. 94) that the limiting of access is valid. This holding, appellants submit, precludes the granting of an injunction against doing what the district court concedes may be done.

Logical application of the *Toomer* case supports appellants' position. The declination of equitable jurisdiction as to the income tax statute presents an issue similar to the one here. Both statutes allegedly would deprive the complainants invalidly of their property: the one by requiring payment of money to the state, the other by withholding payment of money by the state. Both provide a method for obtaining money from the state: the one by a suit for a refund, the other by a suit for damages. In both the right of

the claimant to receive the money may be disputed by the state. With regard to the statute in *Toomer*, this court said:

"In the absence of any showing by appellants that they could not take advantage of this procedure to raise their constitutional objections to the tax, we cannot say that they do not have an adequate remedy at law." 334 U. S. 385, 392.

No such showing has been made by appellees here either. In fact, the availability of the state statutory proceeding is so clear (R. 71-4) that no such showing could be made.<sup>4</sup>

In addition, the district court adverted to §9 of the Pennsylvania statute to support its decision to exercise jurisdiction. It compared this provision with this Court's reference in *Toomer v. Witsell* to the fact that the boat owners would risk long imprisonment and heavy fine for defiance of the statute under attack in that case. Section 9 of the Pennsylvania act is manifestly no more than a traffic control regu-

<sup>4</sup>In fairness appellants point out that the existence of an adequate remedy at law has been held to refer to the existence of a federal remedy at law. *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 64, 69 (1935). Unlimited application of this principle has been criticized, see *Beckwood, Maw and Rosenberry, The Use of the Federal Jurisdiction in Constitutional Litigation*, 43 Harv. L. Rev. 26, 454 (1930); *Toomer v. Witsell*, 334 U. S. 385 (1948), and *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341 (1951), appear contrary to such unlimited application; and the district court in this case initially felt that existence of a state statutory proceeding would obviate the need for federal court interference (Certified Record, Transcript of Pre-Trial Hearing of February 3, 1956, pp. 17, 18, 23, 32-a and 33).

lation. It applies to all persons who violate regulations for the use of limited access highways, not just to the abutting property owners; and it provides for a fine of five to twenty-five dollars or one day's imprisonment for each dollar of unpaid fine. This hardly bears comparison with the statute in the *Toomer* case either in kind or in degree. That statute's penal sanctions applied directly to the activities which the Court held were invalidly regulated, while here the penalizing of an access violation simply enforces what the district court itself held to be valid action.

*Toomer v. W. Well* sets forth minimum requirements which must be met in order to justify the exercise of federal equity jurisdiction. First, the injury must flow from the state action held to be invalid. The above discussion demonstrates that any injury which appellees would suffer does not stem from what the district court held to be the constitutionally deficient provision of the statute. Second, there must be no adequate remedy at law. The district court predicated its exercise of equitable jurisdiction upon the finding that "... plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts..." (R. 91). At the district court's own behest the constitutionality of the statute had already been litigated in the state courts, with the result that its constitutionality had been made clear by the state court's affirmance of the availability of a recognized statutory proceeding in which appellees' rights could be determined and protected. Thus, the district court's basis for exercising its jurisdiction rests upon a fallacious assumption.



Quite apart from these considerations, principles of comity recognized by this Court are pertinent here. *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341 (1951); *Railroad Commission of Texas v. Pullman Company*, 312 U. S. 496 (1941); *Massachusetts State Grange v. Benton*, 272 U. S. 525 (1926). Appellants believe that these principles, viewed in light of the fact that we are here dealing with a complex substantive issue more amenable to adjudication in a state forum, additionally compel the conclusion that the district court erred in here exercising its jurisdiction.

## II. THE DISTRICT COURT, BASING ITS ACTION UPON AN INTERPRETATION OF THE PENNSYLVANIA STATUTE, CONTRARY TO THE INTERPRETATION OF THE HIGHEST STATE COURT, ERRED IN ENJOINING ENFORCEMENT OF ALL PROVISIONS OF THE STATUTE

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### A. The District Court Improperly Construed the State Statute Contrary to the Construction of the Highest State Court

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The most singular feature of the instant case is that the district court, after staying proceedings before it and remitting the parties to the state courts for a definitive construction of the statute (R. 66-8), proceeded thereafter to interpret the statute without regard to the state proceedings and the statutory interpretation had therein. Because the procedure followed and the result obtained is so important here, a somewhat detailed resume is in order.

Recognizing initially that no interpretation of the questioned statutory provisions had ever been rendered by the state courts, the district court explored with the parties the possibility of retaining jurisdiction while an action was brought in the state courts (Certified Record, Transcripts of Pretrial Conferences, December 2, 1955, pp. 192-5, 128-133, and February 13, 1956). Both parties indicated to the court their conviction that the state courts would hold

that since the statute provided for a proceeding at law (i.e. before viewers, etc.), an action in equity would not lie (Certified Record, Transcript of Pretrial Conference, February 13, 1956, pp. 19, 22, 23). Circuit Judge Staley, however, expressed the view that, were the statute held to provide a legal remedy by which appellees' rights could be determined and, if existent, measured, the statute would clearly be constitutional and the federal action would be dismissed. (Certified Record, Transcript of Pretrial Conferences, December 2, 1955, p. 115, and February 13, 1956, pp. 17, 18, 23, 32-a and 33).

Thereupon, an action in equity in the state courts was begun by appellees. Just as the parties had foreseen, the lower state court dismissed the complaint (R. 71-4), 8 Pa. D. & C. 2d 535 (1956). The reasoning of the opinion of that court is so vital to a determination of the issue now presented that it bears verbatim quotation:

"The plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation of authority to support it. At all times the plaintiffs can rely on the provisions of the Constitution of Pennsylvania, Article I, Section 10, that no private property shall be taken or applied to public use 'without just compensation being first made or secured.' Neither do the plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. The plaintiffs' main

attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway without compensation. What the property owners here are asking this Court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is constitutionally required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of the plaintiffs' rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P.S. 2391.8.

"The Supreme Court of Pennsylvania has made it indisputably clear that a Pennsylvania Court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See *Gardner v. Allegheny County*, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the Legislature, in The Limited Access Highways Act, *supra*, has provided a way in which every property owner may have it decided whether he is entitled to compensation, and, if so, when, for what, and in what amounts. Where the Legislature has provided a way and a remedy, it becomes the exclusive remedy available; *Hasting's Appeal*, 374 Pa. 120 (1953); Section 13 of the Act of March 21, 1806,



P. L. 558, 4 Sm. L. 326, 46 P.S. 156. For a late case see *Jacobs v. Fetzner*, 381 Pa. 262 (1955).

"It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then at that time plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the Common Pleas Court and a jury trial, and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, whatever they may be, will be guarded and protected." (R. 73-4)

The Pennsylvania court thus held (1) that appellees had available to them under the Limited Access Highways Act the usual and accepted statutory remedy before a board of viewers with subsequent rights of appeal and (2) that in such statutory proceeding any constitutional right to damages which appellees might have would be fully protected and secured. But because a Pennsylvania court sitting in equity had no jurisdiction to determine appellees' constitutional right to damages when an adequate statutory proceeding was available, the action was dismissed.

On appeal the Supreme Court of Pennsylvania affirmed *per curiam*, adopting as its own the lower

court's opinion (R. 77). 389 Pa. 635, 133 A. 2d 178 (1957).<sup>5</sup>

Despite this unequivocal language in the state courts' opinion, both the appellees and the district court felt that a definitive construction of the state statute had not been obtained (R. 76, 77, 87). Both indicated that failure of the state courts to determine the substantive compensation issue somehow justified further and final action by the district court. Both erred in their analysis of the state proceeding.

First, neither the district court nor appellees have taken the position that a state requirement that one's right to damages be determined in a statutory proceeding rather than in equity violates any constitutional guarantee. Second, the state courts' interpretation of the statute makes it clear that such a statutory proceeding is available to appellees. Third, the state courts' interpretation also makes it clear that appellees' constitutional right to damages is fully protected by the statute. This holding might be aphorized thus: the Constitution is the measure of the statute. The only unanswered question after the state courts' decision was whether the Constitution requires damages to be paid to appellees.

Appellants recognize that in a state statutory proceeding the state courts might hold that appellees have no constitutional right to damages. Such a decision, however, cannot affect the constitutionality of the

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<sup>5</sup>More recently, the Pennsylvania Supreme Court, in *Gardner v. Allegheny County*, 393 Pa. 120 (1958), reaffirmed the doctrine that a court of equity could not determine whether a taking of property had occurred or the amount of damages resulting therefrom.

statute itself; it involves only an interpretation of the Constitution and would, of course, be reviewable by this Court. A reversal by this Court of such determination would not affect the statute since, as the state courts have held, the statute provides for the payment of damages if the Constitution requires such payment.

The decision of the district court failed to recognize this vital distinction between an unanswered constitutional question and an uninterpreted statute. Existence of the unanswered constitutional question could not justify the district court in undertaking an independent interpretation of the Pennsylvania statute. Furthermore, this is not a case like *Government and Civic Employees Organizing Committee CIO v. Windsor*, 353 U. S. 364 (1957), where the constitutional question was neither presented to nor passed upon by the state courts.

As noted, the state courts here held that the breadth of the statute is measured by the protection of the Constitution, the statutory compensation requirement being as broad as, but no broader than, that of the Constitution itself. In holding that the Pennsylvania statute does not provide for compensation for what the district court regarded as the taking of a property right, the district court has given the statute an interpretation which clearly conflicts with that of the state judiciary. If the limiting of highway access, unaccompanied by an appropriation of land, really does constitute the taking of a property right, then, according to the state courts, the statute guarantees compensation therefor. The contrary decision of the district court, in effect, overrules the Supreme Court

of Pennsylvania in the latter's construction of the state statute. This construction is binding on the federal courts. *Albertson v. Mullard*, 345 U. S. 242, 244 (1953); *Aero Mayflower Transit Co. v. Commissioners*, 332 U.S. 495, 499-500 (1947).

Appellees, in their Motion To Affirm (p. 10), cite *Doud v. Hodge*, 350 U. S. 485 (1956), to support the district court's right and duty to construe a state statute even where the state courts have not construed it. Citation of that case for such a principle is most dubious. In *Doud* this Court simply held that it was error for a district court to dismiss a complaint for lack of jurisdiction on the ground that the state courts had not rendered a definitive interpretation. It concluded:

"We do not decide what procedures the District Court should follow on remand." 350 U. S. 485, 487.

Upon remand the district court considered the issue on the merits and did hold the Illinois statute in question unconstitutional, a holding subsequently affirmed by this Court. *Morey v. Doud*, 354 U. S. 457 (1957). In doing so, the federal courts did not presume to differ, in their construction of the Illinois statute, with the construction previously rendered by the Supreme Court of Illinois (which had upheld the statute's constitutionality against a similar attack). Thus, the federal courts there differed with the state courts only as to the import of the Federal Constitution and not, as in the case at bar, as to the meaning of the state statute.



**3. The District Court Improperly Refused To Sever  
the Provision Held To Be Unconstitutional From the  
Remainder of the Act**

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After conceding that the appellants could validly limit access to the highway and that this kind of regulation constituted a proper exercise of state power (R. 94), the district court struck down the entire statute because, according to it, no provision was included by which appellees could be compensated for their losses, a defect which the district court regarded as fatal to the entire statute (R. 100-1). Its exact language follows:

"The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a 'severability clause' (§15, 36 Purdon's Pa. Stat. Ann., § 2391.15). However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account."

Three objections may be made to this refusal to sever. First, if the district court meant that the statute contains no provision granting appellees a procedural remedy by which they could recover whatever compensation they are entitled to, its conclusion was clearly in conflict with the binding state court holding (R. 73-4). Even absent this state court interpreta-

tion, general Pennsylvania law would provide a remedy.<sup>6</sup>

Second, if the district court meant that, even though the statute provided a procedural remedy, it failed to guarantee the payment of such damages as appellees are constitutionally entitled to, it again reached a conclusion contrary to the binding state court determination (R. 73-4). Moreover, appellants point out that under Article I, §10, of the Constitution of Pennsylvania, just compensation must be paid when private property is taken for public use. Absent any language at all in the statute regarding payment of damages, appellees, as the state courts unequivocally pointed out (R. 73), can rely on this state constitutional guarantee in the statutory proceeding.

Third, the strict principle set down by the Court in *Watson v. Buck*, 313 U. S. 387 (1941), and *Dorchy v. State of Kansas*, 264 U. S. 286 (1924), concerning severability was violated by the district court's action. The statute questioned here contains an express severability clause in §15. In addition Pennsylvania has a general severability requirement in §55 of its Statutory Construction Act of May 28, 1937, Pamphlet Laws, page 1019, 46 Pa. Stat. Ann. §555. The logic and reason behind the requirement that severability be recognized is well illustrated by the present case for, as has already been noted, absence of the invalid provisions would not harm the appellees. The district court's refusal to sever the invalid pro-

<sup>6</sup> See *Smedley v. Erwin*, 51 Pa. 445 (1866). See also *United States v. Causby*, 328 U. S. 256, 267 (1946); and *Kohl v. United States*, 91 U. S. 367 (1876).

visions from the remainder of the statute, in the face of this specific legislative intent to the contrary, and in the absence of a contrary ruling by the state courts,<sup>7</sup> ignores the principle set down by this Court.

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<sup>7</sup> See *Morey v. Doud*, 354 U. S. 457 (1957).

**III. THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE PENNSYLVANIA TO COMPENSATE AN ABUTTING LANDOWNER OR TENANT, WHERE NO LAND IS TAKEN, FOR HIS LOSS OF ACCESS RESULTANT FROM THE CONVERSION OF AN UNLIMITED ACCESS HIGHWAY TO A LIMITED ACCESS HIGHWAY**

**A. To Prevail, Appellees Must Establish That an Abutter's Enjoyment of Unlimited Highway Access Is a Property Right and That the Restriction Thereof by Governmental Regulation Constitutes a "Taking" in the Constitutional Sense**

Let it be assumed *arguendo* that the case at bar cannot be decided without resolving the question of compensability, under the United States Constitution, of loss arising from restriction, by the state, of access to a public highway. It is respectfully submitted that the Constitution here imposes no requirement of payment.

Under the statute in question limitation of highway access could occur in any one of three ways: (1) simultaneously with the construction of a new road, (2) to an existing road accompanied by the taking of some land of abutting owners, or (3) to an existing road without the taking of any abutting land. The present case involves only the third situation.

Although the constitutions of many states require the payment of compensation where property is dam-



aged or injured, even though not taken, other constitutions, including those of the United States and Pennsylvania, require compensation to be paid by the sovereign only where property is taken.<sup>8</sup> Under the United States and Pennsylvania constitutions, an abutting landowner's right to compensation, in the third situation referred to above, is dependent upon his showing, first, that his enjoyment of unlimited access to a public highway is a property right and, second, that restriction thereof by governmental regulation constitutes a "taking" in the constitutional sense.

Appellants recognize and acknowledge that, although "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety," *Chicago B. & Q. Railway Company v.*

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<sup>8</sup> Reese, *Legal Aspects of Limiting Highway Access*, National Academy of Sciences, National Research Council, Highway Research Board Bulletin 77 (1953), p. 38, n. 23, lists the "taking" states as follows: Alabama (except as to particular governmental or private agencies), Connecticut, Delaware, Florida, Idaho, Iowa, Indiana, Kansas, Maine, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina (by judicial decision), Ohio, Oregon, Pennsylvania (except as to particular governmental or private agencies), Rhode Island, Tennessee, Vermont, and Wisconsin. The same source, p. 44, n. 75, catalogs the "damage" or "injury" states as follows: Alabama (as to municipalities and private entities), Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Massachusetts (by statute), Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania (as to municipalities and private entities), South Carolina (by judicial decision), South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

*Illinois ex rel. Drainage Comm'rs.*, 200 U.S. 561, 592 (1906), there are instances in which the form of regulation so diminishes the value of property as to constitute a taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); cf. *U. S. v. Causby*, 328 U.S. 256 (1946); *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958). Equal validity, however, adheres in the co-ordinate principle that a right to compensation does not arise merely because governmental regulation deprives an owner of the most profitable use of his property. See *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946).

The nature of the issue at bar compels an examination of the problem from the standpoint of the conflicting interests here at play. Is the loss which, admittedly, will be inflicted upon the abutting owners one which should be borne by them alone; or is it one properly to be shared by the public as a whole? "Traditionally [this Court has] treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." *U. S. v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

### **B. Appellee's Enjoyment of Unlimited Highway Access Is Not a Property Right**

1. *An abutter's right of access does not exist as against the right of the public to the most efficient use of a public road for public travel.*

The issue of whether an abutting owner has a right of access is one which cannot be determined in the

abstract. Certainly, in the absence of governmental regulation, everyone has the right to enter and leave a highway at whatever point he desires, as long as he does not commit a private trespass; thus, in a sense, everyone has a right of access. Perhaps an abutter further has a special right of access as against any use of the highway for non-highway purposes. It does not follow, however, that the abutter possesses a special right of access as against the right of the public to use the road most efficiently for the very purpose for which the road was constructed—the facilitation of public travel. This distinction is recognized and expounded upon in *Sauer v. City of New York*, 206 U.S. 536, 542-3 (1906). See 2 Nichols, *Eminent Domain* (3rd Ed.), §6.444, pp. 361-2.

A study of the origin of the legal principle of "right of access" reveals that traditionally the law has determined rights of abutting owners by seeking to discover the purpose of the road or highway upon which their properties abut. Wilkie Cunningham, in *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19 (1948), an article which the district court regarded as authoritative (R. 94), traces the development of the right of access concept from the horse and cart days of early English and colonial history, when neighboring landowners cleared passageways through woods and fields so that they could haul produce to nearby villages. It was taken for granted that, having contributed the construction and maintenance labor, the abutting landowner should have a right of access to "his" road at any place he desired. From this common understanding and common custom sprang the common law. The right, then,

apparently arose out of the basic purpose for which nearly all highways and streets, until modern times, were constructed—to afford ready access to the lands over and beside which they ran. Obviously, this purpose could hardly be accomplished without a right of ingress and egress in abutting landowners. See also, Moody, *Condemnation of Land for Highway or Expressway*, 33 Texas L. Rev. 357, 365-366 (1955); *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298 (1951).

All three articles cited above point out that, with the development of highways designed primarily as arteries for the expeditious flow of traffic between major termini, the traditional reasoning can no longer be applied to all roads and highways. Certainly a highway such as that involved in this case is not a land service road, but rather a traffic service road. Today, the abutting owners, as such, contribute nothing to the locating, designing, constructing, and maintaining of a highway. Today, the significant question is whether the "right of access" of the abutting landowners ever comes into existence.

Where roads are designed primarily to serve the needs of landowners in the immediate vicinity, it may be entirely proper to hold that these landowners have a special right of access thereto. Where, however, a road has been constructed not primarily for local service, but rather for the furnishing of a safer and more efficient mode of travel between distant points, the abutting property owners should have no greater right than that vested in the public at large. As a matter of abstract justice such an abutter should have no



more right of access to a highway right-of-way than an abutter would have to a railroad right-of-way. Since the purpose of highways like the one involved in this case is not merely to serve the local needs of a particular community or landowner, the reasons which gave rise to the granting of a special right no longer exist. The disappearance of these reasons should be accompanied by a commensurate diminution or elimination of the right of access.

An example of the current trend in limiting the right of access is the decision of the Supreme Court of Missouri in *State v. Clevenger*, 365 Mo. 970, 291 S.W. 2d 57 (1956). More recently the New York Court of Appeals, in *Cities Service Oil Co. v. City of New York*, No 201, Nov. 21, 1958, 140 N.Y. L.J. No. 100, p. 11, specifically rejected the contention of an abutter, whose access was impeded by the municipality's establishment of a bus stop adjacent to his property, that the "right of ingress and egress is a paramount property right." The court answered, "On the contrary, it is the right of the public to the use of the streets which is absolute and paramount." Even in jurisdictions which hold that an abutting owner has a right of access to the general system of roads and highways, the right has been denied with respect to certain types of roads. See *State v. City of Toledo*, 75 Ohio App. 378, 62 N.E. 2d 256 (1944) (boulevards).

The district court's opinion correctly reveals that the status of rights of access in Pennsylvania is still amorphous. For example, the opinion first cites *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. 2d 842 (1938), to show that Pennsylvania courts regard ac-

cess as a property right and later cites *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 A. 309 (1932), and several other cases to show that the same courts deny compensation for obstruction of access by the state where there is no physical appropriation of property. Since a right is a right only to the extent that courts protect it as such, the extent to which Pennsylvania recognizes highway access as a property right remains unsettled.

2. *Any right of access which appellees may have can be conserved by the establishment of local service roads.*

If it be assumed, nevertheless, that the owners of property abutting upon the highway involved in the instant case have a right of access, the question arises as to the extent of that right. The author of *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298 (1951), summarizes the extent of the right of access by concluding that an abutter has the right only to get from his property into a public thoroughfare and thence, in a reasonable manner, to the general system of streets and roads. Where the state, in establishing a limited-access highway, provides for the construction of local service roads by which abutting property owners may reach the highway, even though by a more circuitous route, there should be and is in law no denial of the right of access.

The difference between complete isolation of a tract of land, a situation which would present the strongest possible case for damages, and the availability of some access is geographically the difference between an is-

land and a peninsula. That the distinction is not without legal validity is evident from cases such as *Jones Beach Boulevard Estate, Inc. v. Moses*, 268 N.Y. 362, 197 N.E. 313 (1935), where an ordinance restricting "U" turns and left turns on a parkway was upheld as applied to an abutter who, in his deed conveying land for the original construction of the road, had expressly reserved several rights-of-way over the highway and who by reason of the ordinance was forced to drive in a southerly direction a distance of five miles before he could turn and proceed in a northerly direction towards the City of New York. The principle of the Jones Beach case was reaffirmed in *Gilmore v. State of New York*, 298 Misc. 427, 143 N.Y.S. 2d 873 (1955), where local service roads were held to satisfy the abutter's right of access. See *People ex rel. Department of Public Works v. Schultz Co.*, 123 C. A. 2d (Calif. App.) 925, 268 P. 2d 117 (1954); see also annotations at 43 A.E.R. 2d 1072.

Section 3 of the challenged statute authorizes the Secretary of Highways, in connection with the designation of a limited-access highway, to lay out or construct local service highways, which §1 defines as follows:

"A local service highway is defined as a public highway either existing, or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway."

Since the Secretary is authorized to construct local service roads to provide the abutting owners here

with access to the proposed limited-access highway, the statute does not of itself eliminate the right of access.

The complexity of the problem as it touches the appellees can be appreciated by considering the differing effects which the contemplated state action may have upon the various members of their class. In some cases, the abutters may be completely landlocked;<sup>9</sup> in others, they may have access to local service roads; some abutters may enjoy access to other existing roads; and others may have access to points of ingress and egress established by the state under §1 of the act. Unfortunately, the district court proceeded upon the unwarranted and unsupported assumption that all the appellees would be landlocked. Thus, the court in its opinion (R. 94) declares: "... we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such." In support of this conclusion the opinion quotes *Carazalla v. Wisconsin*, 269 Wis. 593, 71 N.W. 2d 276 (1955), as holding that "compensation must be paid where the limitation of access results in a 'complete' blocking of all access from the land of the abutting owner." We submit that neither the Wisconsin decision nor the law review articles cited by the lower court support the view that damages must be paid in all instances, i.e., irrespective of whether the abutting owners are left with some means of ingress and egress to and from their properties.

The inability to determine at this time which of the appellees will be landlocked by the challenged state

<sup>9</sup> See Stipulation of Counsel (R. 45).



action re-emphasizes the desirability of relegating the appellees to the statutory proceeding. At that time every landowner or tenant abutting upon the road may press his claim for damages, not in the abstract, but with full knowledge of the exact effect of the state action upon him. In such a proceeding the rights of the property owners can be fully protected without sacrificing the rights of the state.

3. *Any property right which appellees may have is nevertheless subject to the Commonwealth's six percent reserve interest.*

In any event a reserve interest held by the Commonwealth in appellees' properties is yet another reason for rejecting appellees' claim of access rights. In *Plank-Road Company v. Thomas*, 20 Pa. 91, 93-4 (1852), the Supreme Court of Pennsylvania declared:

"So far as we know or believe, every grant of land within this Commonwealth, from the first settlement down to the present day, has contained an express reservation to the state, of six acres out of every hundred, for roads. The legislature may authorize the land so reserved to be used for its proper purposes without paying the value of it to the grantee, his heirs or assigns. The six percent belongs to the state, and she may constitutionally appropriate it to the use it was meant for."<sup>10</sup>

<sup>10</sup> Accord: *Workman v. Mifflin*, 30 Pa. 362 (1858); *Township of East Union v. Comrey*, 100 Pa. 362 (1882). For an historical discussion of the six percent rule, see 35 Dick. L. Rev. 192 (1931).

As recently as 1920, the State Supreme Court, in *Harrington's Petition*, 266 Pa. 88, 90, 109 A. 791 (1920), admonished that, "In considering the subject of highways, it is always well to remember that land taken therefor is regarded a little differently from land taken for other public uses, inasmuch as in the original grant from the Commonwealth it was subject to six percent allowance for roads, and compensation for taking or injury was a matter of grace, not of right."

Although the district court regarded appellants' argument based on the foregoing authorities as "interesting" and "plausible" (R. 101), it refused to apply the principle there enunciated to the instant case because "we cannot believe that the original grantors ever envisaged limited access highways" (R. 101). By the same reasoning the interstate commerce clause of the Federal Constitution could not give Congress the right to regulate aviation or motor transportation.

Although this case presents a federal question, the problem of rights in real property is a matter upon which the state judiciary is deemed to speak conclusively.<sup>11</sup> See *Eldridge v. Trezevant*, 160 U.S. 452 (1896), where the State of Louisiana was held to have, for the construction of public levees on land abutting upon the Mississippi River, a servitude valid against the compensation claim of a property owner whose land was taken for construction of a levee. Is not this comparable to the interest of the Commonwealth of Pennsylvania in land necessary for road purposes?

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<sup>11</sup> See *Fox River Paper Company v. Railroad Commission of Wisconsin*, 274 U.S. 651 (1927); *Suydam v. Williamson*, 65 U.S. (24 How.) 427 (1861).

If Pennsylvania's right to use appellees' property for road purposes is superior to appellees' own interest therein, has not Pennsylvania, *a fortiori*, a superior right to use for essentially the same purpose any lesser interest which may adhere in the land?

Accordingly, even though the result may appear harsh, the Commonwealth, without compensating any of the appellees, may properly claim the interest here involved as part of its six percent reservation of all Pennsylvania land.

### C. Restriction of Highway Access by Governmental Regulation Does Not Constitute a "Taking" in the Constitutional Sense

1. *The limiting of appellees' highway access will serve to promote the public safety and welfare.*

The Pennsylvania statute which the district court held to be unconstitutional indicates on its face that the legislative object is to facilitate the movement of highway traffic. §2(b). It cannot be gainsaid, we submit, that state officials charged with the maintenance of state roads might reasonably conclude that the flow of traffic will be speeded and, in addition, that accidents will be reduced by controlling access to a heavily traveled thoroughfare connecting a densely populated metropolitan area with a great modern airport.

The depositions<sup>12</sup> of Joseph Barnett, Assistant Deputy Commissioner of the United States Depart-

<sup>12</sup> The statements, originally in the form of affidavits attached to defendants' Motion for Summary Judgment (R. 24-31, 40-43), were by Stipulation of Counsel and Order of Court admitted to the Record as depositions (R. 83).

ment of Commerce, a pioneer in the development and designing of express highways, and of Donald M. McNeil, a Pittsburgh traffic engineer of vast experience, point out the manifold advantages of a limited, as contrasted with an unlimited, access highway: (1) the limited access highway permits traffic to flow without interruption; (2) the limited access highway does not lose its capacity to handle traffic; (3) the limited access highway accommodates a much greater volume of traffic (several times the number of vehicles per lane per hour); (4) the limited access highway minimizes the hazards of travel (over 50% reduction in accident and mortality rate); and (5) the limited access highway results in increased ease of driving, lower cost of motor vehicle operation and savings of man-hours.<sup>13</sup>

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<sup>13</sup> For a comprehensive discussion and bibliography of materials dealing with the purposes and functions of limited access highways, see Cunyningham, *The Limited Access Highway*, 13 Mo. L. Rev. 19 (1948). See also Duhaime, *Limiting Access to Highways*, 33 Ore. L. Rev. 16 (1953). The substance of these articles is conveniently summarized in the following quotation: "Various studies have shown that the numerous entrances to the [unlimited access] highway, the frequent drawing in and out of the traffic stream, the parking, and the increased pedestrian traffic, all engendered by commercial use of the roadside, jointly conspire to reduce substantially the traffic capacity of the highway and to promote congestion, and to cause a large proportion of the highway accidents." Bowie, *Limiting Highway Access*, 4 Md. L. Rev. 219 (1940).

2. *Highway regulations are particularly encompassed within the police power of the state.*

"... injury may often come to private property as a result of a legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no taking of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation." (Emphasis by Court)

*Chicago, B. & Q. Railway Company v. Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 584.

Similarly, in *New Orleans Public Service v. New Orleans*, 281 U.S. 682, 687 (1930), the Court stated: "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law [cases cited]."

If there be one area of the law where these precepts are particularly honored, it probably lies in the field of highway control. The especially wide latitude which is reposed in the states when dealing with their highways appears to rest upon the conviction that, as expressed in *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 187 (1938), "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . The state has a primary and immediate concern in their



safe and economical administration."<sup>14</sup> The case at bar, as far as our research discloses, is the first instance in which a federal court has invalidated a state statute designed solely to promote highway safety and to facilitate the movement of highway traffic.

Private rights of access, like all private rights, are held and enjoyed subject to the paramount right of the public to regulate in the public interest. Particularly should this be true where the subject matter of the regulation is property, such as the Airport Parkway, which belongs to the public itself. See 1 Lewis, *Eminent Domain* (3rd Ed.), §120; Enfield & McLean, *Controlling the Use of Access*, National Academy of Sciences, National Research Council, Highway Research Board Bulletin 101 (1955), p. 70.<sup>15</sup>

In support of its conclusion that the limiting of appellees' highway access would constitute a taking of property, the lower court quoted from the opinion in *Donovan v. Pa. Co.*, 199 U.S. 279, 302 (1905). An ex-

<sup>14</sup> In like vein, the Supreme Court of Pennsylvania, in *Commonwealth v. Funk*, 323 Pa. 390, 394, 186 A. 65 (1936), asserted: "The plenary power of the legislature over the highways of the Commonwealth is of ancient standing, and seldom, if ever, has been questioned . . . Highways, therefore, being universally the property of the state, are subject to its absolute direction and control." See also *Maurer v. Boardman*, 336 Pa. 17, 7 A. 2d 466 (1939), *aff'd* *Maurer v. Hamilton*, 309 U. S. 598 (1940).

<sup>15</sup> See also *Socony Vacuum Oil Co., Inc. v. Murdock*, 165 Misc. 713, 1 N.Y.S. 2d 574 (1937) (refusal to permit construction of driveway); *Calumet Federal Savings & Loan Association of Chicago v. City of Chicago*, 306 Ill. App. 524, 29 N.E. 2d 292 (1940) (restriction of access by construction of curbs).

amination of the extract set forth in the district court's opinion will show that that case does not support the proposition for which it is cited, for the *Donovan* opinion clearly points out that an abutting owner's right of access is subject to "legitimate public regulation" and that a deprivation of property occurs only when the abutter is denied access "other than by the exercise of legitimate public regulation."

It may not be inapposite to emphasize here that what the state proposes to do is to limit, or even destroy, free access between the state's highways and the abutting land because such access has become inimical to the public safety and welfare. The state does not desire any right of access; it does not want, and will not acquire, either for itself or for the general public the right of access between the highway and the abutting property. In other words the aim of the state is merely to prohibit appellee's use of their property in such manner as to injure the public. Such action on the part of the state is, we submit, as proper an exercise of the police power as is the action of a municipality in designating a street to be one-way or in prohibiting parking on a designated thoroughfare or in creating a medial strip (or traffic park) through the center of a road. Although such actions may—and generally do—cause inconvenience to and impairment of the property values of abutting owners, we know of no case in which they have been held to constitute a taking of property.

3. Since governmentally erected physical impediments to access have been uniformly held not to constitute a "taking" in the constitutional sense, the same result should be reached where substantially the same effect is produced by governmental regulation.

Although limited access highways are of recent origin, the reports are replete with instances of governmentally imposed restrictions upon highway access—usually in the form of physical obstructions.<sup>16</sup> In the leading case of *Sauer v. City of New York*, 206 U.S. 536 (1906), the municipality, pursuant to state authority, constructed over a public street an iron viaduct resting upon iron columns placed in the roadway. The construction and maintenance of the viaduct impaired the plaintiff's access to his property abutting upon the street, as well as his light and air. Analogizing the facts to those in the change of grade cases,<sup>17</sup> this Court concluded that the interference with the plaintiff's access was not the result of a taking of his property and that he was not, therefore, constitutionally entitled to damages. If a physical improvement may be made in a public thoroughfare without conferring upon an adjacent property owner a right to damages for loss of access, there is no reason, we submit, why the same result should not follow from

<sup>16</sup> These cases are not to be confused with those involving private obstructions of access for private purposes since the access rights of abutters are generally recognized as superior to the use of the highway for non-highway purposes.

<sup>17</sup> See, for example, cases cited in *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

the enforcement of a state police regulation<sup>18</sup> having the same effect upon highway access.

In *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878); it was held that, although the action of a municipality in constructing a tunnel in a street upon which a tenant's property abutted may have deprived the tenant of access to his property, the municipality could not be held liable in damages under the Federal Constitution, the Court declaring:

"... Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority."<sup>19</sup>

As stated by the Court, the issue in *Delaware River Comm'n. v. Colburn*, 316 U.S. 419, 425 (1940), was "the right of respondents to recover consequential damages to their New Jersey land, due to interference

<sup>18</sup> Access here may be limited without the erection of physical barriers.

<sup>19</sup> See also *Meyer v. Richmond*, 172 U.S. 82 (1898) (erection by railway company of tracks, sheds and fences in street in front of plaintiff's property); *S. B. Penick Co. v. N. Y. Cent. R. Co.*, 111 F. 2d 1006 (3rd Cir. 1940) (construction of viaduct on street in front of plaintiff's property); *Marchant v. Penna. R. Co.*, 153 U.S. 380 (1894) (construction of elevated railroad in front of plaintiff's property); and *Meade v. Portland*, 200 U.S. 148 (1906) (closing of street and approach to river after wharves had been lawfully constructed by property owner in front of his land).

with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land." Although a New Jersey statute directed the commission to "establish . . . the damages for property taken, injured or destroyed," this Court, reversing the New Jersey Court of Errors and Appeals, held that such a provision did not require payment of consequential damages. The opinion cites numerous cases, many of them decided in Pennsylvania, which hold that consequential damages cannot be recovered where loss of access is inflicted by the erection of structures on public thoroughfares.

Similarly, in *U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945), this Court, after weighing the competing interests of the public and a riparian landowner, concluded that, where the action of the Federal Government in lowering the level of a river (without the acquisition of any land) adversely affected the capacity of the claimant's power plant, there was no taking of property under the Fifth Amendment<sup>20</sup> and thus no right to damages. Mr. Justice Jackson, speaking for the Court, reasoned as follows:

"The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements

<sup>20</sup> Since both the Fifth and Fourteenth amendments protect, in substantially the same language, against deprivation of property without due process of law, the liability of a state under the Fourteenth Amendment should be no greater than that of the Federal Government under the Fifth. See *U. S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 278-9 (1943).



so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only that result from a taking of property. . . . The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in nearly every state in the Union that 'there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law.' (pp. 502, 510-11).

We have indicated that we can see no material difference between denial of access to a highway by erection of physical structures and denial of access by police regulation. In furtherance of that assertion we point out that there should be no difference in principle between governmental action which denies to an abutting property owner access to a public waterway and governmental action which denies to an abutting property owner access to a public highway. The cases dealing with waterways are illustrative of the status of the law here applicable.

The farm of the plaintiff, in *Gibson v. U.S.*, 166 U.S. 269 (1897), fronted on the Ohio River, where plaintiff maintained a landing. This was the only means by which she could ship goods to and from her farm. Although a dike constructed by the United

States did not come into physical contact with the farm and did not throw water upon the plaintiff's land, the physical presence of the dike did prevent ingress and egress to and from the landing except at high tide. This handicap resulted in a substantial diminution in the value of the farm. In denying recovery, this Court held that the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or the direct invasion thereof, but was only the incidental consequence of the lawful and proper exercise of a governmental power.

The property owner in *Scranton v. Wheeler*, 179 U.S. 141 (1900), like the farm owner in the *Gibson* case, was deprived of access to navigability from his land by reason of the construction by the government of a pier in front of his property. In disallowing the plaintiff's claim to damages, the Court explained that the owner acquired the right of access subject to the contingency that this right might be destroyed by governmental action aimed at improving navigation.<sup>21</sup> The same reasoning, we submit, should apply in the case of a highway; for the interest of an abutting property owner in a highway would seem to be no greater than that of an abutting property owner in a waterway; and, surely, the interest of a state in improving transportation on a highway is no less than that of the United States in improving transportation on a waterway.

<sup>21</sup> For more recent cases applying the foregoing principle, see *U. S. v. Commodore Park*, 324 U.S. 386 (1945); *U. S. v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592 (1941).

The physical obstruction cases are, we submit, of compelling significance. If the deprivation of access resulting from the erection, as a part of public works, of physical structures does not entitle an abutting property owner to damages, the accomplishment of a similar result without an actual erection of barriers should produce no different legal consequence; for it would be a simple matter for the state to erect such barriers so as to limit access to the road involved in the case at bar.

IV. A PENNSYLVANIA STATUTE PROVIDING FOR THE LIMITING OF ACCESS TO A PUBLIC HIGHWAY, WITHOUT LIABILITY ON THE PART OF THE STATE FOR PAYMENT OF CONSEQUENTIAL DAMAGES IN THE ABSENCE OF A TAKING OF PROPERTY, DOES NOT DEPRIVE AN ABUTTING LANDOWNER OR TENANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW OR DENY HIM THE EQUAL PROTECTION OF THE LAWS OR IMPAIR THE OBLIGATIONS OF HIS CONTRACTS

**A. A State Is Not Constitutionally Required To Pay Consequential Damages Where No Property Is Taken**

We have argued that the conversion of an unlimited access highway to a limited access highway does not constitute a taking of property. A rejection of this view, however, would not necessitate the invalidation of the Pennsylvania Limited Access Highways Act. Section 8, which the district court found to be constitutionally deficient, provides that: "The owner or owners of private property affected by the construction or designation of a limited access highway shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken." Nothing in this language purports to relieve the state of its constitutional obligation to pay damages where property is taken.

To the contrary, the section specifically provides that damages shall be allowed a property owner where there is "an actual taking of property." Thus, if the district court is correct in holding that the limiting of highway access constitutes a taking of appellees' property, this statute on its face requires payment of damages therefor. Appellants have never argued otherwise;<sup>22</sup> no court has ever decided otherwise.

That the limitation of access to the Airport Parkway might work a hardship upon appellees or lessen the value of their land or impair existing or contemplated uses thereof does not in itself impose upon the state the duty to pay compensation. Such losses are merely what the law describes as consequential. In holding that the government is not liable for the payment of such damages, this Court in *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 510 (1923), explained:

"The conclusion to be drawn from those and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. [case cited]. If, under any power, a

<sup>22</sup> Included in the Record certified to this Court, but not printed, are transcripts of the entire argument before the district court on all phases of this case. An examination of the transcripts will reveal that the defendants at all times contended that the Legislature intended the provisions of the challenged statute to be as broad as, but no broader than, the constitutional requirement. Although defendant's counsel did argue, to the same effect as here, that plaintiffs are not constitutionally entitled to damages, he did not contend or concede that the Pennsylvania Supreme Court would so hold.



contract or other property is taken for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." (Emphasis in original)

Relying upon the *Omnia Commercial* case, this Court in *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943), reaffirmed the constitutional principle in the following language:

"... not all losses suffered by the owner are compensable under the Fifth Amendment. In the absence of a statutory mandate [case cited] the sovereign must pay only for what it takes, not for opportunities which the owner may lose. . . . It is well settled in this Court that, 'Frustration and appropriation are essentially different things.'" (pp. 281-2)

To the same effect, see *Campbell v. U.S.*, 266 U.S. 368 (1924); *U.S. v. Petty Motor Co.*, 327 U.S. 372, 377-8 (1946); *U.S. v. Cox*, 190 F. 2d 293 (10th Cir. 1951), cert. denied 342 U.S. 867 (1951).

Although the district court attached considerable significance to the business loss which would attend the issuance of the declaration of limited access (R. 99), it is established that such loss is not an element of just compensation in the absence of a statute expressly allowing it. *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923); *Mitchell v. U.S.*, 267 U.S. 341 (1925). Cases have held that a state or a political subdivision thereof may constitutionally go even as far as to prohibit, in specified areas, objectionable business activities (whether or not tradi-

tionally considered nuisances) without liability for the payment of compensation, despite the fact that the conduct of the business may have been lawful at the time of its inception. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (livery stable); *Cusack Company v. City of Chicago*, 242 U.S. 505 (1917) (billboards); *Standard Oil Co. v. City of Tallahassee*, 183 F. 2d 410 (5th Cir. 1950) (gasoline station).

### B. The State Is Not Here Estopped

The district court's opinion refers to, but does not consider, plaintiff's argument of estoppel, arising from the allegation (para. 3 of the complaint, R. 12) that, at the time of the original condemnation of land for the Airport Parkway, the County of Allegheny (a political subdivision of the Commonwealth) argued that, in the determination of the damages sustained by the members of the plaintiff class, consideration should be given to the benefits which the plaintiffs would derive from their enjoyment of highway access.

In point of fact the evidence does not sustain plaintiffs' position in this respect. The excerpts reprinted in the Record, 45-64, indicate that, while the County of Allegheny advanced this argument in the cases which were then litigated—and many of the appellees herein had no involvement, direct or derivative, in those proceedings—that contention was strongly disputed by the property owners. The condemnation occurred in 1949 (R. 45). It is not unlikely that the property owners were then aware of the Pennsylvania

Limited Access Highways Act, enacted several years before; and, consequently, the possibility that highway access might at some future date be limited was a factor which should have been, and undoubtedly was, considered in the adjudication of the plaintiffs' damages.

No constitutional infirmity and no obligation to pay consequential damages arises from the fact that the state may undertake now to declare the Airport Parkway a limited access highway after having permitted its use as an unlimited access highway heretofore. A more extreme case was *Reichelderfer v. Quinn*, 287 U.S. 315 (1932), in which a property owner, who had been assessed for special benefits supposedly accruing from the proximity of his property to a public park, sought to enjoin the Commissioners of the District of Columbia from carrying out an act of Congress directing the building of a fire engine house in the park. A prior act of Congress had dedicated the land perpetually for use as a park. It was admitted that the presence of a fire engine house would depreciate the value of the plaintiff's property. In denying the plaintiff relief, this Court asserted:

"It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority [cases cited].

But in such cases no private right is infringed. For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise." 287 U.S. 315, 318-9.

Thus, that property owner could not invoke an estoppel against the sovereign even though the sovereign had assessed him for benefits which it later destroyed.

Plaintiffs in the case at bar allege (para. 3 of the complaint, R. 12) the reverse situation, viz., that the damages allowed them at the time of the condemnation of their properties, for the construction of the road, were diminished by the future benefits which it was believed would result from their unrestricted access to the highway. In rejecting this type of argument in the *Reichelderfer* case, the Court declared: "The possibility that the United States might, at some later date, rightfully exercise its power to change the use of the park lands, so far as it affected present value, was a proper subject for consideration in valuing the benefits conferred" <sup>23</sup> (287 U.S. 315, 323). Similarly, the possibility that the Commonwealth of Pennsylvania might, at some later date, rightfully exercise its power to limit access to the highway, insofar as it affected plaintiffs' property interests, was a proper subject for consideration in determining their damages.

<sup>23</sup> See also *People v. Sack*, 202 Misc. 571, 110 N.Y.S. 2d 556 (1952).

## Argument

The estoppel argument appears to rest in part upon the implied, if not expressed, contention that appellees have a vested right to unlimited highway access by reason of the fact that their various business enterprises were launched at a time when access to the highway was unrestricted. What we submit to be a fair paraphrase of their contention demonstrates the fallacy. In constructing the road in question, the Commonwealth acted to speed the flow of traffic to the airport; the Commonwealth did not undertake to assure abutting landowners an uninterrupted right to make money out of the traveling public.

### C. The Limiting of Highway Access Will Not Deny Appellees the Equal Protection of the Laws

The district court's opinion mentions, but does not discuss, appellees' contention that the Limited Access Highways Act denies them the equal protection of the laws. This argument appears to rest upon the supposed unfairness arising from (a) the fact that owners of property abutting upon the Pennsylvania Turnpike and other newly constructed highways, are permitted by law to receive consequential damages and (b) the provision of §8 of the challenged statute authorizing the Commonwealth to share the expense of property damages with its political subdivisions.

Like the due process clause, the equal protection clause of the Fourteenth Amendment has never been interpreted as a limitation upon the legitimate exercise of the state's police powers. *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U.S. 556 (1894). Furthermore, the



prohibition is not directed against reasonable legislative classification and does not invalidate the reasonable imposition, upon one class, of restraints not imposed upon another. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935). See also *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Missouri Pac. R. Co. v. Mackey*, 127 U.S. 205 (1888). It is perhaps supererogatory to note that, actually, the restrictions which a limited-access highway would impose upon appellees are no greater than would be imposed upon any others since all persons would be equally limited in their access to the road.

Owners of property abutting upon the Turnpike and other roads are entitled under Pennsylvania law to recover consequential damages resulting from an actual taking of their property. The statute involved in this proceeding does not purport to authorize less; it merely proscribes the payment of consequential damages where there is no taking of property. The difference, in practice, is between consequential loss flowing from a taking of property<sup>24</sup> and consequential loss resulting from the exercise of the state's police powers without a taking. The distinction, we submit, is of sufficient legal breadth to justify a difference in legal consequence. In any event, we fail to perceive how the state's generosity in one instance can result in the imposition upon it of a constitutional obligation of perpetual generosity thereafter.

The provision of the act in question authorizing the Commonwealth to share the cost of property damages

<sup>24</sup> In the case of the Turnpike, the limiting of access was coincident with the initial condemnation of land for the road.

with its political subdivisions does not in any way affect the liability of the Commonwealth, but merely establishes a method by which the Commonwealth can share in the liability of these subdivisions.<sup>25</sup> In this respect the procedure is no different from that followed under other Pennsylvania statutes. See, for example, Act of June 1, 1945, Pamphlet Laws 1242, §523, as amended, 36 Pa. Stat. Ann. §670-523.

**D. The Limiting of Highway Access Will Not Unconstitutionally Abridge Appellees' Obligations of Contract**

The district court's opinion notes, but does not discuss, appellees' contention that the enforcement of the Limited Access Highways Act would abridge their obligations of contract. This argument apparently stems from the fact that some of the appellees are tenants occupying abutting property under leases from the owners thereof.

It is well established that Art. I, §10, cl. 1, of the Constitution, which forbids a state to pass any law impairing the obligation of contract, does not restrict a state in the proper exercise of its police powers. *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). As was stated in *Manigault v. Springs*, 199 U.S. 473, 480 (1905):

<sup>25</sup> The liability of political subdivisions of the Commonwealth under Art. XVI, §8, of the Constitution of Pennsylvania is broader than that of the Commonwealth under Art. I, §10, since the former, but not the latter, are liable for damages arising from an injury or destruction to property, as well as from a taking.

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Accord: *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Chicago and Alton R. R. Co. v. Transbarger*, 238 U.S. 67 (1915); *N. Y. & N. E. R. R. v. Bristol*, 151 U.S. 556 (1894).

That contracts relating to the use of highways or abutting property are in no special category under the contract clause is evident from *Sproles v. Binford*, 286 U.S. 374 (1932), in which it was held that "contracts which relate to the use of highways must be deemed to have been made in contemplation of the regulatory authority of the State." Cf. *Stephenson v. Binford*, 287 U.S. 251 (1932).

## CONCLUSION

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For the foregoing reasons, the final decree of the district court should be reversed, the injunction against appellants should be dissolved, and judgment should be entered in favor of appellants.

Respectfully submitted,

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## APPENDIX "A"

### LIMITED ACCESS HIGHWAYS

#### ACT

Authorizing the establishment, construction and maintenance of limited access highways and local service highways; and providing for closing certain highways; providing for the taking of private property and for the payment of damages therefor; providing for sharing the costs involved and for the control of traffic thereover; providing penalties, and making an appropriation.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. A local service highway is defined as a public highway, either existing, or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway.

Section 2. (a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to



*Appendix "A"—Limited Access  
Highways Act*

declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway.

(c) The authorities of any political subdivision of the Commonwealth are hereby authorized to declare any existing or new highway, or, part thereof, now or hereafter under their jurisdiction and control, to be a limited access highway and to construct and maintain the same.

(d) The designation of a limited access highway in a city by either the Secretary of Highways or by the commissioners of the county in which the city is located shall be subject to the approval of the city as evidenced by an ordinance duly passed in accordance with the law. Such approval by a city shall in no way impose any liability upon the city for property damages occasioned by the designation of a limited access highway.

Section 3. The Secretary of Highways with the approval of the Governor, or local authorities in connection with the designation or construction of a limited access highway may lay out or construct local service highways. Such local service highways shall be so located as to permit the establishment by private

owners or their lessees of adequate fuel and other service facilities for the users of limited access highways. The location of such facilities may be indicated to the users of the limited access highways by appropriate signs, the size and location of which shall be determined by the authorities having jurisdiction. No commercial enterprise or activity shall be located or authorized by the State or by any political subdivision thereof, within or on any public property which is part of the right of way of any limited access highway.

Section 4. In the establishment or construction of limited access highways, the authorities responsible therefor shall have the power to eliminate intersections at grade with other highways, by the construction of grade separation structures, by the closing of such intersecting highways at the right of way lines of the limited access highway, or by relocating such intersecting highways as in their discretion will best serve the public interest.

Section 5. Where the Secretary of Highways proceeds under the authority of this act, he shall have authority to construct and maintain any tunnel, bridge, culvert, drainage structure or other structure or appurtenances incidental thereto, other than sanitary sewers, as may be necessary in the construction of the limited access highway: Provided, however, That the Secretary of Highways shall have authority to replace, reconstruct or restore existing sanitary sewers.

Section 6. The establishment of a limited access highway or a local service highway by the Secretary

of Highways, as herein provided, shall be by a plan approved by the Governor and filed in the office of the recorder of deeds of the proper county, at the expense of the county. The establishment of a limited access highway or a local service highway by the authorities of any political subdivision of the Commonwealth, as herein provided shall be in the same manner as now or hereafter provided by law for the opening, widening or relocating of highways by such political subdivision.

Section 7. After the establishment of a limited access highway it shall be unlawful to establish or lay out any new highway intersecting the limited access highway except by and with the consent of the authorities responsible for the limited access highway.

Section 8. For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an ac-

tual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the authorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivisions in which such highway is located.

Section 9. The authorities responsible for the maintenance of limited access highways shall have exclusive jurisdiction over the control of the use of such highways, and, by the erection of appropriate signs, may control the ingress and egress of vehicles thereto, therefrom and across, and the parking and speed of vehicles thereon, or may exclude any class or kind of traffic therefrom, and, by the erection of signs or the construction of curbs, painted lines, or other physical separations, provide separate traffic lanes for any class of traffic or type of vehicle: Provided, however, That nothing herein contained shall restrict the authority or jurisdiction of any peace officer as defined in The Vehicle Code from enforcing such control over traffic or parking as have been or may be established for limited access highways: And provided further, That the provisions of The Vehicle Code not superseded by the provisions of this act shall be and remain

in full force and effect for the use and operation of motor vehicles on limited access highways. It shall be unlawful for any person to violate any parking or speed restriction or traffic control established for a limited access highway as provided herein, and any person violating such restriction or control shall, in a summary proceeding, be subject to a fine of not less than five (\$5) dollars nor more than twenty-five (\$25) dollars and costs of prosecution or imprisonment for one day for each dollar of fine and costs remaining unpaid.

Section 10. Maintenance of a limited access highway shall include the removal of snow, the maintenance of curbs, shoulders, ditches and slope areas and may include the lighting of the highway or any part thereof and the planting and trimming of trees, grasses, shrubs and vines on the right of way or slope areas.

Section 11. It shall be lawful for any political subdivision of the Commonwealth to make a contribution to the Department of Highways toward the cost of the establishment or improvement of a limited access highway or local service highway by the Department of Highways or toward the cost of maintenance of a limited access highway by the Department of Highways. It shall be lawful for any county and any of its political subdivisions to enter into agreements for the sharing of any or all costs of the establishment or improvement of limited access highways and local service highways.

Section 12. Local service highways constructed under authority of this act shall, upon completion of



construction, be maintained by and at the expense of the political subdivision in which they are located.

Section 13. Except as herein provided, the powers granted under the provisions of this act shall not change, alter or diminish any authority or right now or hereafter vested by law in the Secretary of Highways or the officials of any political subdivision of the Commonwealth relating to highways.

Section 14. So much of the money in the Motor License Fund as may be necessary from time to time is hereby specifically appropriated to the Department of Highways for carrying out the provisions of this act. The political subdivisions of the Commonwealth are authorized to provide funds for the establishment, construction or maintenance of limited access highways or local service highways in the same manner as now or hereafter provided by law for the improvement or maintenance of highways.

Section 15. The provisions of this act are severable, and if any of its provisions shall be held to be unconstitutional by any court of competent jurisdiction, the decision of the court shall not affect or impair any of the remaining provisions of this act.

Approved—the 29th day of May, A.D. 1945.

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**NO. 157**

**LEWIS M. STEVENS**, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, and **GEORGE M. LEADER**, Governor of the Commonwealth of Pennsylvania, Appellants

• v. •

**J. K. CREASY**, **WILLIAM W. McNAMEE**, **FRANK RANALLO**, **A. W. TUICCILLO**, **ED KLEEMAN** and **R. G. CUMMISKEY**, on Behalf of Themselves and other property owners and lessees similarly situated, and **JACK C. MARSHELL** and **ALICE E. MARSHELL**, Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania.

**BRIEF FOR APPELLEES**

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**NO. 157**

LEWIS M. STEVENS, Successor to Joseph<sup>c</sup> Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Appellants

v.

J. K. CREASY, WILLIAM W. McNAMEE, FRANK RANALLO, A. W. TUICILLO & ED KLEEMAN and R. G. CUMMISKEY, on Behalf of Themselves and other property owners and lessees similarly situated, and JACK C. MARSHALL and ALICE E. MARSHALL, Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania.

**BRIEF FOR APPELLEES**

**COUNTER-STATEMENT OF QUESTIONS  
PRESENTED**

1. After the Courts of Pennsylvania have declined to construe a condemnation statute of Pennsylvania may the Federal District Court proceed to construe the statute and upon finding it to be repugnant to the Constitution of the United States enjoin its enforcement?

2. Was the District Court correct in enjoining the enforcement of a Pennsylvania Statute, known as The

*Counter-Statement of Questions Presented.*

Limited Access Highways Act of 1945, which purports to deprive owners of land abutting an existing highway of access to their lands without compensation but which nevertheless permits local municipal authorities, if they so desire, to pay such compensation, and the Secretary of Highways, if he so desires, to contribute to such payment?

3. Where, as Appellants concede, the right of Appellees to recover damages resulting from a taking of existing easements is "unsettled" and "amorphous" did not the District Court properly enjoin the taking?

4. After Allegheny County, an instrumentality of the Commonwealth, has condemned a right of way for a new highway, and damages have been assessed together with benefits, and compensation payable to landowners has been paid, may Appellants, also agents of the Commonwealth, now deprive said landowners or their successors of the benefit of access without further compensation?



*Counter-Statement of the Case.*

**COUNTER-STATEMENT OF THE CASE**

Appellees will not materially challenge Appellants' statement of the case but respectfully suggest the following in preface thereto:

In 1949 Allegheny County, a municipal subdivision of the Commonwealth of Pennsylvania, purchased the necessary land and constructed a new airport called "The Greater Pittsburgh Airport". In connection therewith a new four-lane highway called "The Airport Parkway" was built from downtown Pittsburgh to the airport, a distance of about 20 miles.

The first 15 miles of this road was built by the Commonwealth as a limited access highway under the provisions of the Limited Access Highways Act of 1945. That five mile section of road is the highway to which access is in controversy in the case at bar. The County purchased or condemned the necessary property and built the five mile section of road as a general access highway. Appellees, or predecessors in title to appellees, were parties to the purchase or condemnation proceedings (R., 45). As required by the law of Pennsylvania,\* the Board of Viewers and the Court of Common Pleas, at that time, in determining compensation assessed not only damages but benefits accruing to land owners by the construction of the new highway.

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\*Act of Assembly of 1929, Mar. 2, P.L. 1278, Article VII, Sec. 523, since superseded, P.L. 723 July 28, 1953, Article XXVI, Sec. 2613, 16 Purdon's Penna. Statutes, Sec. 5613.

*Summary of Argument for Appellees.*

**SUMMARY OF ARGUMENT FOR APPELLEES**

Appellees submit that the District Court acted with complete propriety in regard to the substantive law, procedure, and all considerations of comity, and should be sustained.

The state courts declined to pass upon the constitutionality of the act of assembly challenged by Appellees and declined to define Appellees' rights. The Court of Common Pleas of Dauphin County ruled, in effect, that Appellees must wait until they have suffered damages and then, with denial of access a *fait accompli*, they may enter the state courts to discover whether or not they may recover compensation. The Supreme Court of Pennsylvania affirmed that ruling.

The District Court thereupon exercised its jurisdiction and, upon a recognition of the irreparable and very substantial damages which all parties agree would be suffered by Appellees through enforcement of this statute and its possible subsequent invalidation, granted a permanent injunction.

An injunction is a proper remedy in the premises for at least three reasons. The District Court found that the statute as written does purport to deprive Appellees of the right of access from an existing highway to their lands adjoining the highway, a property right recognized generally throughout the United States and in Pennsylvania, without providing any compensation therefor. Appellees had called other flaws in the statute to the attention of the District Court, upon which that Court did not find it necessary to pass. The statute on its face reveals arbitrary and unreasonable discriminations.

*Summary of Argument for Appellees.*

against Appellees in that they are denied compensation for the taking of a property right which in other instances has been paid by the Commonwealth; because the statute provides specifically for the payment of damages for the construction of a limited access highway but not for the designation of an existing highway as a non-access highway; and because the statute authorizes Appellant Secretary of Highways to contribute state funds to the payment of damages for the loss of access in such cases and to such an extent as his unlimited discretion dictates, provided that the political subdivision of the Commonwealth first assumes voluntarily the responsibility to pay damages. This last mentioned provision of the statute is an arbitrary delegation of power which cannot be justified and which is unparalleled in any statute known to Appellees.

When any governmental authority acts under eminent domain legislation, the land owner affected should see a clear, certain and prompt method of obtaining compensation. In the instant case, if Appellees are left to their remedy at law following condemnation, the statute may eventually be declared invalid, or the state withdraw; the law of Pennsylvania does not provide any clear and certain method in either event by which the damage Appellees will have suffered in the interim may be recovered.

Aside from the questions of the constitutionality of the statute complained of, all parties and the District Court construe the act to provide no compensation for loss of access unaccompanied by the taking of land. If this construction is correct, Appellees should be estopped, under the circumstances of the instant case. When the

*Summary of Argument for Appellees.*

five mile length of highway, which is concerned herein was built, the land needed therefor was condemned and paid for on the express understanding that the owner of abutting land would derive considerable commercial benefits from their position fronting on the new highway. Their damages at that time having been qualified by this benefit, equity insists that the same benefit can not now be removed by executive fiat without further compensation.

Although Appellants have referred to the theory that the Commonwealth of Pennsylvania has perpetually reserved 6% of all land for highway use, this theory has apparently not heretofore alone ever supported an uncompensated taking for highway use.

No severance of the unconstitutional portion of the statute can be effected in its application to Appellees because without the invalid portion the remainder provides no means of compensation for the loss of property rights to protect which rights this action was brought.

## Argument.

### ARGUMENT

#### I. The Federal District Court Acted Properly in Construing the Legislation Under Attack After the State Courts Failed to Do So.

Both parties are agreed that the District Court had jurisdiction of the subject matter of this suit. (Appellants Brief, p. 12).

By its order of May 1, 1956 (R., p. 67) the District Court noted that a substantial federal question was involved in the suit and stayed all proceedings until "a definitive construction of the act . . . by the state courts be had." This procedure had been recommended by this Court in *Spector Motor Service Inc. v. McLaughlin*, 323 U.S. 101, 106 (1944).

Following the order of the District Court, Appellees, as plaintiffs, filed a suit for an injunction in the Court of Common Pleas of Dauphin County, Pennsylvania, which court has jurisdiction of cases brought against officials of the Commonwealth. Appellants filed a motion to dismiss in that court and after argument the Court of Common Pleas dismissed the suit (R., 71-74) with the conclusion that Appellees "had an adequate remedy at law", i.e., the resort to viewers as provided by Pennsylvania law. Appellees appealed from that decision to the Supreme Court of Pennsylvania, which, after argument, affirmed without opinion. *Creasy v. Lawler*, 389 Pa. 635, 133 A. 2nd 178 (1957).

The Limited Access Highways Act of 1945, which Appellees attack, refers to the procedure to be followed for eminent domain that is set forth in the Act of Assembly of Pennsylvania of 1945, June 1st, P.L. 1242, Article



*Argument.*

III, Sec. 301 et seq., (36 Purdon's Pennsylvania Statute Annotated, Sec. 670-301 ff.) The pertinent sections are appended hereto, pages 36 to 39. A study of Section 302 of that Act leaves Appellees greatly in doubt as to the remedy available to them if the Secretary of Highways, by executive fiat, decrees the highway in question to be a limited access highway; possibly, under the authority of Section 303 of the statute, the owner suffering loss of access may petition for the appointment of viewers by the Court of Quarter Sessions in his particular county. In other words, Appellees were refused equity by the state courts on the assumption that if they were damaged they would be free to initiate an action at law. In effect Appellees were told that they should give up their access to their own land, their homes and businesses and then inquire whether they are to be compensated. The state courts never touched upon the nature of the damages to be suffered, nor the questionable sections of the statute regarding contribution to damages by the Secretary of Highways, and they specifically refused to answer the question characterized as pivotal by the District Court below; to wit: Whether the loss of access unaccompanied by a taking of land would be compensated for. The Dauphin County Court said:

"It is not for this court to determine whether a adjoining property owner has a vested property right to direct access to an existing free-access highway. If such a right exists plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the ordinary course

### Argument.

of the procedure provided by The Limited Access Highway Act they will have a right of appeal to the common pleas court and a jury trial and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, *whatever they may be*, will be guarded and protected." (latter emphasis supplied).

Appellees respectfully request that this Court compare the opinion of the Common Pleas Court of Dauphin County, quoted above, with the late opinion of the Supreme Court of North Carolina, in *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. (2nd) 129, 133 (1957). In that case, similar to the instant case, the state court refused to enjoin enforcement of a statute comparable to the Pennsylvania statute now before the Court. The North Carolina court decided, however, as the basis of its refusal, that the land owner had an adequate remedy at law because his easement of access is a compensable property right:

"The right is in the nature of an easement appurtenant to the property and abridgement or destruction thereof by vacating or closing the street . . . may give rise to special damages compensable at law . . . Interference with the easement, which is itself property is considered, pro tanto, a taking of the property for which compensation must be allowed . . ." (96 S.E. 2d at p. 133)

In short, the North Carolina courts in refusing the injunction eliminated the need for equitable relief by adequately defining the plaintiff's rights at law.

That Pennsylvania courts are not always so chary of defining property rights in equity actions is illustrated

## Argument.

by *Gardner v. Allegheny County*, 382 Pa. 88; 114 Atl. 2nd 491 (1955). That case concerned the flight of aircraft in and out of the same "Greater Pittsburgh Airport" concerned in the instant case. A property owner there was seeking an injunction, and damages for the deprivation suffered by him due to flights of aircraft over his home. Although the Supreme Court of Pennsylvania there, as here, refused to assess damages, the Court did, for the guidance of all parties, declare on the authority of *United States v. Causby* 328 U.S. 256 (1945) (382 Pa. at p. 116): "that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking'".

When the District Court referred parties in the instant case to the state courts, Appellees anticipated and, we presume, so did the District Court that the state courts would either grant us an injunction because of the flaws in the statute which we attack or refuse the injunction as did the North Carolina Court in the *Hedrick* case on ground that loss of access, as a property right, would be paid for. The state courts did neither; the injunction was refused, but Appellees were told that they must wait until after access has been taken from them—until their businesses are closed and they are evicted from their homes—before they may even inquire in the courts whether they are entitled to be compensated for this loss.

Appellees submit that, despite Appellants' argument on this point to the contrary, the state courts in the instant case have not construed the statute. Until the District Court granted the permanent injunction no

*Argument.*

court had acted to assist either the property owner or the Commonwealth, the condemning authority, in determining their respective rights or liabilities arising from the deprivation of access. Appellees, of course, did not have to be told that the courts of the Commonwealth would be open to them if they believed that they had a grievance. The state courts gave Appellees no assurance beyond the already axiomatic one that if they have a legal cause they have a legal remedy. The result of the state decision, if allowed to stand unquestioned, would be that Appellants could proceed immediately to bar access of Appellees to their property from the parkway; Appellees would be evicted from their residences and their businesses closed, with no idea of whether or not the Commonwealth would be liable for damages, which have been estimated conservatively at \$1,000,000 (R., 35). The state courts were not deterred in this finding by consideration of the generally accepted doctrine that a prime requirement of an eminent domain statute is the availability of a clear, certain and prompt method of payment. 29 C.J.S., Eminent Domain, Sec. 99.

The District Court made it perfectly clear that it endeavored to comply with the requirement of comity and prudence referred to by Appellants in their brief (Appellants brief, p. 23). Faced with the failure of the state courts to meet the issue and convinced on the stipulated evidence that Appellees would suffer irreparable damages if the act were enforced, before its constitutionality was clearly established, the District Court proceeded to construe the act. This procedure has been approved in the past and followed by Federal District Courts many times in the absence of construction of

## Argument.

a statutory law by a state court: *U.S. v. Jones*, 229 F. (2nd) 84, C. A. 10, (1956); cert. den. 351 U.S. 939; *Capitol Records v. Mercury Records Corp.* 221 F. 2nd 657 C.C.A. 2 (1955). Other instances in which Federal District Courts have taken upon themselves to decide how a state court would interpret a statute if a controversy were brought before the state court in a form it considered justiciable are *Jacobs v. Camden Fire Insurance Association*, 135 F. Supp. 837, W.D.Pa. (1955); *Russo v. Merck & Co.*, 138 F. Supp. 147, D.R.I. (1956).

Even if the state courts had construed the statute and decided that it met the requirements of the Federal Constitution in all respects, such a finding would not bind the District Court in regard to Appellees' rights under the Constitution of the United States: *Morey v. Doud*, 354 U.S. 457, (1957). In the *Doud* case, plaintiffs entered the Federal Court to seek an injunction against the enforcement of a statute of Illinois. The Supreme Court of Illinois had earlier decided, in *McDougall v. Lueder*, 389 Ill. 141, 58 N.E. 2nd 899 (1955), that the act was constitutional; the District Court nevertheless held the act to be unconstitutional and its finding was sustained by this Court. The *Doud* case was not a novel departure; in *Webb v. S. Ry. Co.* 248 F. 618, 621, C.A. 5 (1918), cert. den. U.S. 518, a statute of Alabama was challenged in the Federal District Court. The court said:

"The Supreme Court of Alabama has decided that the statute quoted is valid: *Parnell v. Southern Railway Co.*, 74 S. 437. As the validity of the statute is questioned on the ground that it is violative of the Constitution of the United States, that decision is not conclusive."



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In the instant case, Appellees came before the Federal District Court as citizens of the United States seeking that Court's protection against deprivation of their property without due process, against arbitrary and unreasonable discrimination and against the denial of equal protection of the laws. This is a proper case for the Federal Court, in its equity jurisdiction, to intervene and to enjoin enforcement of a state law.

## **II. Equity Properly Intervened to Enjoin Enforcement of the Limited Access Highways Act.**

The Federal statute establishing the procedure under which Appellees acted (62 Stat. 968, 28 U.S.C.A. Sec. 2281), was enacted by Congress to provide persons in the situation of Appellees with protection against the effects of the enforcement of unconstitutional statutes by state officials.

An injunction lies to prevent the enforcement of an invalid eminent domain statute: "As a general rule the owner may by injunction restrain the taking or injury of his property where such taking or injury is under the authority of an invalid ordinance or restriction." 30 C.J.S. Eminent Domain Sec. 403, p. 124.

Though neither Appellees nor court below have placed particular reliance upon the point, it seems clear that this Court in the past has conditioned a refusal of equity in the Federal Courts upon the availability of an adequate Federal remedy at law. (See footnote, Appellants' Brief, p. 21). It would appear that even under a narrowed application of that rule it would be appropriate in this instance wherein the state courts are clearly not disposed to provide equitable protection for the property

rights of Appellees. See *Petroleum Company v. Commission*, 304 U.S. 209, (1938); *Di Giovanni v. Camden Insurance Association*, 296 U.S. 64, (1935); *CB&Q Railway Co. v. Osbourne*, 265 U.S. 14 (1924).

A condemnation statute which fails to provide certain and reasonably prompt compensation to the owner of the seized property is inoperative and will not support condemnation proceedings: 29 C.J.S., Eminent Domain, Sec. 99; *Bragg v. Weaver*, 251 U.S. 57, (1919); *Sweet v. Rechel*, 159 U.S. 380, (1895).

Authorities on the general subject of Eminent Domain agree that where, as in this case, the constitutionality of a condemnation statute is in serious doubt, the property owner concerned is entitled to an injunction pending resolution of the question of constitutionality: *Jahr, Law of Eminent Domain*, p. 435; 2 *Louis on Eminent Domain* (2nd Edition), p. 1351.

Where the right to damages in the event of a taking is not clear, certain and reasonably prompt in effect, equity should give relief. Appellees' right to compensation following deprivation of access in the present State of Pennsylvania law is certainly far from clear. Appellants' statement (Appellant's Brief, p. 39) that this question in Pennsylvania is "amorphous" and "unsettled" (p. 40) understates the existing confusion. The Court of Common Pleas of Dauphin County in the instant case denied an injunction, saying: "It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free access highway" (R. p. 74). The same court a few months previously had said: "Clearly an owner of land cannot constitutionally be deprived of all access to his

premises without compensation. *In re Espenshade*, 69 Dauph. 90, (1956).

In *Breinig et ux v. Allegheny County* 332 Pa. 474, 480, 2 Atl. 2nd 842 (1938) the Supreme Court of Pennsylvania said:

"When land is taken or purchased for highways, the abutting owner retains, as an incident to ownership of the remainder of his land, the right of access or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. It is a property right, protected by the constitution."

The same court, in *Cain v. Aspinwall-Delafield Co.*, 289 Pa. 535, 541, 137 Atl. 610 (1927) said that Appellants, as dominant tenants:

"had the right to make reasonable changes in the surface of the highway which did not appreciably damage an adjoining lot owner, but they do not have the right to create conditions in the highway which damage such lot owner's property or which takes from it the right of ingress or egress."

In other cases, including *Walsh v. Scranton*, 23 Pa. Superior Ct. 276 (1903); and *Stuart v. Gimbel Bros.* 285 Pa. 102, 131 Atl. 728 (1926) the courts of Pennsylvania have time and again defined the right of access as a property right; on the other hand, in *Soldiers and Sailors Memorial Bridge Case*, 308 Pa. 487, 490, 162 Atl. 309 (1932) the Supreme Court of Pennsylvania held that a plaintiff whose access and light were reduced by the building of a bridge by the Commonwealth has no legal remedy. The court in that case held loss of access to be a consequential damage and not an actual taking. More

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recently, in *Koontz v. Commonwealth* 364 Pa. 145, 147 70 Atl. 2d 308 (1950) the Supreme Court of Pennsylvania said: "It is, of course, not open to dispute that before the Commonwealth can be made to answer, in the present state of the statute law (Sec. 304 of the State Highway Law of June 1, 1945, P.L. 1242), for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land. (*Brewer v. Commonwealth*, 345 Pa. 144, 145, 27 A. 2d 53)"

This Court will note that the courts of Pennsylvania have not agreed upon a definition of the right of access as a property right or as a incidental attribute which may be demolished without liability. In the cases in which compensation has been allowed the courts have emphatically defined access as an easement, a property right. In other cases it becomes a privilege to be denied for public convenience.

In summary, it appears that the courts of Pennsylvania have attempted to vary the character of a condemned property right or easement according to the identity of the condemnor, which, Appellees submit, is illogical and illegal. In view of this unsettled legal picture, an injunction is the obvious method by which Appellee's rights may be protected until their legal position is clarified.



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- A. *If, as Appellants concede, the statute purports to destroy Appellees' existing access without compensation, it is a deprivation of property without due process.*

Appellants have maintained at all times that the Limited Access Highways Act of 1945 does not require the Commonwealth to pay Appellee any compensation for deprivation of Appellees' rights of access. The District Court agreed with this construction of the statute and held it invalid for that reason.

This Court has held in the past that governmental action can amount to a taking, compensable under the laws of eminent domain, without necessarily including the physical appropriation of land: *U. S. v. Causby*, 328 U.S. 256 (1945). The Supreme Court of Pennsylvania adopted the same point of view; *Gardner v. Allegheny County* 382 Pa. 88, 116, 114 Atl. 2d 491 (1955). Throughout the United States, access over the years has come to be regarded as an easement which may not be taken any more than the land itself without compensation.

Appellees will not recapitulate in detail the exhaustive discussions of the evolution of the concept of access as a property right. Various articles and cases are cited in the opinion below, in Appellants' brief and herein. In 43 A.L.R. 2d 1072, 1073, (note 4) this annotation appears:

"The doctrine granting a right of access to abutting land owners does not appear to rest on too satisfactory a foundation either logically or historically but it has apparently gained such wide spread



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acceptance that the chances of having it overturned altogether are remote."

In 39 C.J.S. Highways, Sec. 141, p. 1081, it is stated as a general proposition that: "an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation". See also 22 A.L.R. 942.

In *Muhlker v. Harlem Railroad Co.*, 197 U.S. 544, 571, (1905) Justice McKenna, after a long discussion of the rights of owners of land abutting public ways concluded that the easement of access appurtenant to an abutting lot is as much property as is the lot itself. As Appellants point out (Appellants' Brief, p. 50) the holding of the Muhlker case was considerably qualified by *Sauer v. N. Y.*, 206 U.S. 536, (1907). The Sauer case itself, however, had a long and interesting history following that decision. (See *Crane v. Hahlo*, 258 U.S. 142 (1921) in which it appears that the complaining property owner in the Sauer case eventually received compensation upon a different theory of law.) Justice McKenna, in dissenting from the Sauer decision said, on p. 559:

"I am not insensible of the strength of the reasoning by which this court sustains that conclusion, but certainly all lawyers would not assent to it. Indeed one must be a lawyer to assent to it. At times there seems to be a legal result which takes no account of the obviously practical result. At times there seems to come an antithesis between legal sense and common sense".

In any event the proposition for which the Sauer case stands, i.e., that a state court may define property rights and that the Supreme Court of the United States will not question such definition has obviously been strictly limited by such subsequent decisions as *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). That case is of course one of the milestones in the development of the protection afforded by the federal courts to private persons against the invasion of their rights by state legislatures under the guise of the police power. In that case this Court held that the State of Pennsylvania could not constitutionally under the aegis of the police power deprive the owners of unmined coal of their right to damage the surface of the land by removing the coal. Justice Holmes said (260 U.S. at p. 415): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 302, (1905) this Court said:

"The general doctrine is correctly stated in *Dillon on Municipal Corporations*: "For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundry lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property."

Although Justice Holmes dissented in the *Muhlker* case, in *U.S. v. Welch*, 217 U.S. 333, 339, (1910) he stated

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the opinion of the Court that a private right of way is an easement and is land, and that if it were destroyed for public purposes, such destruction "may as well be a taking as would be an appropriation for the same end."

As Appellants have pointed out in their brief, (p. 35) the requirements for compensation under eminent domain powers are substantially the same for the Federal government and for the Commonwealth of Pennsylvania; that is, neither is required by its organic law to pay "consequential damages" but is only required to pay for an "actual taking" of property. For this reason the case law governing the responsibility of the Federal Government quite logically may be applied to questions arising under the law of the Commonwealth of Pennsylvania.

The right of access of abutting owners has always been limited by "legitimate regulation"; *Donovan v. Pa. Co., supra*. The advent of the limited access highway or through-way, built for a particular purpose, to meet a new demand far removed from the ancient concept of a land service road,\* has called for the reappraisal of the rights of owners of land vis-a-vis the fast-traveling public. The new developments in the law occasioned by this new concept of public or "socialized" traffic management have been explored in the last ten years in many law review articles and texts, some of which are cited in the opinion of the District Court. These articles represent several different points of view.

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\*18AmJur., EminentDomain, 1958 Supp. Sec. 185, note: "a land service road" has been used to describe the normal ordinary road or highway which is regarded as being intended primarily to enable abutting land owners to have access to the outside world, as distinguished from the limited access road which is a 'traffic service road' designed primarily to move through traffic'.

Owen Clarke, in an article entitled, "The Limited Access Highway" 27 *Washington Law Review* 111 (1952) reviewed "the haphazard development of the law of right of access". He observes (p. 123) that "when highway authorities convert existing roads or streets into limited access facilities, abutting owners suffer special injuries in varying degrees. If there is a total blocking of access, obviously the land owner is entitled to compensation."

In an article entitled, "Freeways and the Rights of Abutting Owners", 3 *Stanford Law Review* 298, (1951), the author concludes that, upon the conversion of an existing highway into a freeway, (p. 302): "the damage to the [abutting] property owner is so severe that the courts have universally held that he is entitled to compensation. The public can only justify its act of completely shutting off land under the power of eminent domain."

The doctrine that access cannot be destroyed without compensation has been accepted by several different state courts since the development of the limited access concept and the raising of resultant problems comparable to the instant case: See *Carazella v. Wisconsin*, 269 Wis. 593, 71 N.W. 2nd 276, (1955); *State v. Clevenger*, 365 Mo. 970, 291 S.W. 2nd 57, (1956); *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2nd 129 (1957).

The Supreme Court of Indiana in *State v. Marion Circuit Court* ... Ind. ... , 153 N.E. 2nd, 327 (Oct. 9, 1958) held that the easement of access is a property right which may not be taken without compensation. The Indiana statute operative in that case, the Limited Access Act of 1945, provided:

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"for the purposes of this act such authorities of the state, county, city or town may, acquire private or public property and property rights for limited access facilities and service roads including rights of access, air, view, and light by gift, devise, purchase or condemnation". (Burns' Sec. 36-3105, 1949 Replacement, Acts, 1945, ch. 245, Sec. 5, p. 1113).

The petitioners in that case, state authorities comparable to Appellants in the instant case, asserted, as do Appellants here, that compensation is required only where actual land is taken and is not required where damages resulted from a change in the method of the use of the property earlier obtained by the state. The Indiana Court decided otherwise.

It is especially interesting to note that the Indiana Court, and the condemning authorities, conceded in that case that the property owners could have enjoined the taking for which they were seeking damages, citing *Thomas v. Lauer*, 227 Ind. 432, 86 N.E. 2nd 71 (1949).

Appellants, in their brief (Appellants Brief, p. 40) pointed out that Appellees' rights of access may be conserved by the establishment of local service roads. Whether or not Appellees must suffer complete deprivation of access in order to be entitled to compensation is a question which need not be decided by this Court in view of the stipulation filed below (R., p. 45) that there will be no local service roads available to, at least, certain of the Appellees. The stipulated fact, that action by Appellants under the statute will deprive some of Appellees of all access to a public highway from their land, renders Appellant's discussion of circuitous, indirect and alternative means of access beside the point in the instant case.



*Argument.*

B. *The Limited Access Highways Act of 1945  
Denies to Appellees Equal Protection of the  
Laws*

Section 8 of the Statute here under attack provides, inter alia, as follows:

"For the purpose of *constructing* limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided." (Emphasis supplied).

The statute expressly provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways; it is silent concerning his authority to purchase property upon conversion of an existing road to a limited access highway. It would appear that the legislature by this significant omission has placed a large class of land owners, including Appellees, beyond the pale.

Appellees believe that this language creates a completely arbitrary discrimination between owners of land abutting newly constructed highways and those abutting existing highways like the Airport Parkway which would be converted to a limited access highway by executive action. Although the Dauphin County Common Pleas Court said that Appellees herein would have a remedy at law, it appears to Appellees that this statute reveals no express procedure by which a land owner, upon deprivation of access alone, may bring a claim before a Board of Viewers. As we mentioned earlier, the state courts have merely pointed out to the parties the existing general law concerning the appointment of a Board of Viewers upon petition; but have Appellees

any real assurance that a Board of Viewers to whom they would eventually look for damages will not interpret the legislative omission as a specific denial of their right to initiate proceedings? "*Inclusio Unius Est Exclusio Alterius*". Appellees' right are no less "unsettled" or "amorphous" than is the law in Pennsylvania to date concerning deprivation of access.

Another discrimination appears when the present statute is compared with the act which authorized the Pennsylvania Turnpike, a pioneer in the development of limited access: Act of May 21, 1937, P.L. 774, No. 211. (36 Purdon's Pennsylvania Statutes Annotated Section 652, et seq.) By that statute the Turnpike Commission was authorized and empowered to acquire by condemnation: "Any lands, rights, easements, franchises or other property deemed necessary or convenient for the construction or efficient operation of the turnpike in the matter hereafter provided." The General Assembly thus provided for compensation to property holders for damages arising from the loss or deprivation of access. The discrimination appears when we compare the quoted language of the Turnpike law with another clause of the same section 8 of the Limited Access Highway Act: "The Commonwealth shall not be liable for consequential damages where no property is taken". There is no reasonable distinction between property owners who reside along a non-access highway entitled The Pennsylvania Turnpike and property only a few miles distant along a highway known as the Greater Pittsburgh Airport Parkway.

There is a third and, appellees believe, a most extreme discrimination, practically unparalleled in the law, in Section 8 of the Limited Access Highways Act.

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"The Commonwealth shall not be liable for consequential damages where no property is taken; Provided, however, that the Secretary of High ways shall have authority to enter into agreement for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance".

That section authorizes the Secretary of Highways to pay damages for the loss of access in some cases but not in others. If municipal authorities decide that they have a moral obligation to pay for the loss of access, or a political obligation, or a personal favor to pay, they may make their municipality liable for payment of said damages, and the Secretary of Highways may decide to contribute funds of the Commonwealth to such payment. What is or is not a compensable property right then will be determined in each instance by the discretion of local political authorities. Access may thus be a compensable property right in one land-owner and not in his neighbor. Such a flagrant statutory authorization of discrimination seems unique in the history of the law of eminent domain. It is a reasonable interpretation of the statute to predict that local policy will favor friends and punish enemies with complete freedom by resolving to pay or not to pay for the taking of access.

The fortunate owners of abutting property who would be compensated for their loss of access would be those with sufficient political or other influence upon local governing bodies to prevail upon them to pass the required "proper resolution or ordinance". No chopping of logic can justify this wholesale delegation to any person or agency. Furthermore, the statute is silent regarding what proportion of damages the Secretary may de-

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cide to pay in the instances where contribution is made. Here again the political status of individuals affected and other factors completely beyond the control of the law may govern.

It might well be argued that when the legislature conferred this privilege upon the Secretary of Highways it recognized, in a sort of left-handed way, that such right of access is a compensable property right; otherwise why permit such payment, even on a discriminatory basis?

This indefensible discrimination between owners itself would be sufficient to refute Appellants' argument that the police power will support the statute under attack. The police power does not justify arbitrary discrimination anymore than it justifies deprivation of property, as set forth earlier. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, (1922).

This court will not interfere with a legislative classification which is based upon any reasonable difference: *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, (1955); but as this Court said in *Morey v. Doud*, 354 U.S. 457, 464:

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37-38, 48 S. Ct. 423, 425, 72 L. Ed. 770; *Hartford Steam-Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459, 462, 57 S. Ct. 838, 840, 81 L. Ed. 1223. . . . A statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found. *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264."

*Argument.*

Appellants brush over this point with almost unseemly haste, (Appellants' Brief, p. 64) by comparing it with another statute, that of June 1, 1945, P.L. 1242, Sec. 523, (36 Purdons Pa. Statutes Annotated, Sec. 670-523). The comparison fails immediately upon reading of the latter statute which assures the affected property owners of damages, from one source or another; whereas the Limited Access Highway Act makes recovery contingent upon not just one, but two completely voluntary acts; first, that of the governing body of the particular township, borough, city or county in which the conversion from general access to limited access takes place, and second, that of the Appellant Secretary.

C. *Appellees Should Not Be Relegated to Their Remedy at Law, Even if One Exists, at the Expense of Irreparable Damage.*

By stipulation (R. p. 45) the fact is before the Court that deprivation of access between their abutting properties and the Airport Parkway would cause immediate and substantial damages to Appellees amounting in many cases to eviction.

This Court has held that persons in a position comparable to Appellees herein need not allow themselves to be subjected to great expense and inconvenience through the operation of a state law because they have a theoretical remedy at law. Although Appellants have attempted to distinguish the case, that is the clear holding of *Toomer v. Witsell*, 334 U.S. 385 (1948). For those Appellees who reside on the parkway and have no other means of ingress or egress to and from their properties the only alternative to eviction is to remain upon the



premises and to continue to go to and from their properties onto the highway in defiance of the order of Appellants, thus risking arrest and criminal penalties. We submit that they are not obliged to undergo that absurd ordeal, and the fact that the criminal penalties involved are less drastic than those which concerned the court in the *Toomer* case does not affect the principle.

The proposition that the theoretical availability of a remedy at law should not bar one from equity has been followed universally, but Appellees respectfully call to the Court's attention some cases of particular interest in relation to the instant case. In *Smith v. Shiebeck*, 180 Md. 412, 24 A. 2nd 795 (1942) an injunction was granted preventing a private person from obstructing plaintiff's means of access to a highway via a private road. The court was persuaded by the argument that, although plaintiffs would have had an unquestioned right to recover damages at law, the denial of access would have resulted in an immediate increased fire hazard, would have prevented physicians from reaching the premises conveniently and would have hampered commercial deliveries to the residence and farm of plaintiff. The parallel to the instant case is easily perceived. In an older case, *Del Monte Livestock Co. v. Ryan*, 24 Colo. App. 340, 133 Pac. 1048, (1913) the Colorado Court granted an injunction to prevent the condemnation of a right-of-way because the condemnation would have blocked plaintiff's route to water for his cattle. Although (133 Pac. at p. 1050) "Counsel for appellees vigorously urges that both the statutory and general remedy for damages are open to appellants" the court held, citing several authoritative texts, that an injunction should issue in the face of any irregularity in condemnation proceedings.

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until the right to make such entry has been perfected by a full compliance with the constitution and the laws".

A modern case is *Thomas v. Lauer*, 227 Ind. 432, 439, 6 N.E. 2nd, 71, 73 (1949) : "The owner of such land or right is not required to stand idly by and watch a state agency take his property and destroy his business before taking any steps to protect himself."

Appellees apprehend that condemnation proceedings under the authority of the statute which we attack may expose them to great and irreparable damages. If the injunction now restraining Appellants were removed, Appellants will immediately bar Appellees from access to the Parkway, with the immediate damages resultant which have been described heretofore. We have adverted earlier to the confused state of the law of Pennsylvania concerning access; the holdings of the Supreme Court of Pennsylvania in such cases as *Koontz v. Commonwealth*, 34 Pa. 145, 70 Atl. 2nd 308 (1950) and *Soldiers and Sailors Memorial Bridge Case*, 308 Pa. 487, 162 Atl. 309 (1932), that loss of access by itself is not compensable, would, on their face, authorize a board of viewers, and the Court of Common Pleas, to whom an appeal from the board of viewers lies, to refuse any award. The omission by the legislature of authority to purchase property affected by designation, as contrasted with construction of a limited access highway, would also seem to forbid an award to petitioning Appellees. An adequate test of the statute could not be obtained until the case progressed to the Appellate Courts, and quite possibly to this Court via certiorari; the statute would, then, not be declared invalid until taken before the highest courts.

There is an alternative possibility. Appellees may, after following the same long route to the Appellate Courts, be awarded damages. In that event it is not at all unlikely that the damages payable would prove so great (R., p. 35) that the administrative authorities would determine to abandon the project.

The law of Pennsylvania does not give Appellees, in either situation described above, any clear right to recover damages which they would have suffered by the temporary eviction from their homes and abandonment of their businesses. During the interim in either eventuality all such damages would have resulted from a temporary destruction of the incorporeal hereditament of access. Although there are cases in Pennsylvania in which damages have been allowed in the event of discontinued or abandoned condemnations (see *Reinbold v. Commonwealth*, 319 Pa. 33, 179 Atl. 581 (1935); *Phila. v. Commonwealth*, 284 Pa. 225, 130 Atl. 491 (1925); Philadelphia Appeal, 364 Pa. 71, 70 A. 2nd 847 (1950); in other situations the appellate courts of Pennsylvania have said that, without a physical taking of land, upon abandonment of a condemnation no damages will be paid: *Detweiler v. Williamsburg Borough*, 116 Pa. Superior Ct. 21, 175 Atl. 748 (1935). As a general rule, an owner cannot recover damages after abandonment where there has been no actual taking of the property: 30 C.J.S., Eminent Domain, Sec. 339, p. 15.

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### III. Appellants Are Estopped to Deny Access to Airport Parkway to Appellees.

Although estoppel does not apply generally against state officials it has been held to lie in a proper case in Pennsylvania. In *Commonwealth ex rel Margiotti v. Union Traction Co.*, 327 Pa. 497, 194 Atl. 661 (1937) the court said that laches estops even the Commonwealth (p. 522): [Citing an earlier case]

"After persons have acted 'on the faith of the grants of the state, authenticated by the highest evidence known to the law, she is certainly bound by an estoppel founded upon the purest equity. As against such parties she must be deemed cognizant of the acts of her agents' "

In an annotation at 1 A.L.R. 2nd, 347 it appears that a state may be estopped "when the acts of its public officials alleged to constitute the grounds of estoppel are done in the exercise of powers expressly conferred by law and when acting within the scope of their authority. [Citing cases]"

The parties hereto have stipulated that, at the time Allegheny County condemned the original right-of-way for that section of the airport parkway particularly concerned in this appeal "it was the contention of the County that consideration should be given to the special benefits which it claimed said persons would derive by reason of having frontage on a new highway and direct ingress and egress thereto and therefrom". (R. p. 45, 46). The portions of testimony abstracted from hearings before the Board of Viewers and before the Court of Common Pleas of Allegheny County which are now be-

fore this court. (R., 46 to 61), the arguments of counsel and statements by the Common Pleas Court, (R., p. 61-64) all demonstrate that the condemning authority forcefully placed this consideration before the Board of Viewers and before the Trial Court.

In Pennsylvania a county is a political subdivision of the state: *Commonwealth v. Walker*, 395 Pa. 31, 156 Atl. 340 (1931); *Pa. Turnpike Commission Condemnation Case*, 347 Pa. 643, 32 A. 2nd 910 (1943). The Commonwealth of Pennsylvania, through Allegheny County, at the time of the seizure of lands where this highway is located assured abutting owners in the most emphatic form that they would have access to the new highway. There can be no disputing the fact that if at the time of the original taking the county had conceded the possibility or probability that access to the new highway would subsequently be barred to abutting land owners, this concession would have been an important element in the computation of damages. To allow Appellants who are, no less than the county authorities, agents of the Commonwealth, to confiscate the right of access now without payment, would be grossly unfair and, from a common sense point of view, even fraudulent. In this regard a statement of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, (1922) is interesting: "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for." Appellees have not been paid for the loss of the right of access; Appellants insist that they will not be paid and that they have no right to be paid. Considering these facts, this Court would be amply justified in holding Appellants estopped, aside from every other question in this case.



## Argument.

## IV. "The 6% Theory" Will Not Sustain Any Taking of Property Without Payment.

In Appellants' brief there is considerable discussion of the curious doctrine, in Pennsylvania law, that all original patentees received their land from the Commonwealth subject to a 6% reservation for highway purposes. Because of the lack of definition of this doctrine in its application to particular cases, and the highly dubious status of any reservation of 6% through many subsequent conveyances since the original patents, it will be apparent to this Court that the "6% doctrine" cannot be raised to any dignity higher than an anachronistic curiosity in the legal history of Pennsylvania. Appellees have not found any cases, including those cited by Appellants, in which this doctrine standing alone is the *ratio decidendi* of a holding refusing compensation in a condemnation proceeding.

The cloud on Appellants' theory is demonstrated by the fact that the Courts of Pennsylvania have upon occasion referred to it even in cases involving condemnation by municipal subdivisions, e.g., *Herrington's Petition*, 266 Pa. 89, 109 Atl. 791 (1920), while they have in cases substantially parallel granted not only direct but consequential damages: *Pusey v. City of Allegheny*, 98 Pa. 522, (1881); *Chester County v. Brower*, 117 Pa. 647 12 Atl. 577, (1888).

Further, the justification underlying the 6% reservation as discussed in the cases cited by Appellants is the benefit of the roads to be built to the one whose land is used. It is a clear non sequitur to argue that because the state may build a road across a person's land without payment therefor, that the state may then bar his

access to the road. Appellants can hardly assert that the early reservation of 6% entitles the agents of the Commonwealth thereafter in perpetuity to arbitrarily confiscate property and property rights of any kind from freeholders. Upon analysis, the 6% doctrine appears to be employed by the Pennsylvania courts as a make-weight to bolster any decision in which, in condemnation proceedings, a land owner may seem to be inadequately compensated. It should not be resurrected and raised to a greater dignity today.

V. There Can Be No Severance of the Invalid Portions of the Statute.

The holding of the District Court is explicit in application in that Appellants are enjoined from interfering with or depriving Appellees of their rights to ingress and egress to and from the Airport Parkway. (R. p. 104) This is based upon a finding that insofar as the Limited Access Highways Act of 1945 permits such interference or deprivation, it is unconstitutional. No other action by Appellants has been enjoined. They are free to proceed with any highway construction or development which does not deprive an abutting owner of an existing easement of access to the highway from his land.

Furthermore, no dissection could cure the trouble here because the statute then would need new provisions which would assure compensation to Appellees and those in similar situations in accordance with the principles set forth in the constitutional decisions, and the text book authorities, referred to by the Court below in its opinion. The provision for compensation in

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seizure cases must be "certain and reasonably prompt."  
29 C.J.S. Eminent Domain, Sec. 99.

From C.J.S., Vol. 82, Sec. 93, subject "Statutes,"  
we quote:

"Sustaining the constitutional part while the unconstitutional part falls has been held possible only where it is not necessary to insert words or terms to separate the constitutional part and give effect to it alone . . ."

**CONCLUSION.**

For the foregoing reasons the final decree of the District Court should be affirmed.

Respectfully submitted,

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**APPENDIX****State Highway Law of 1945****ARTICLE III.—EMINENT DOMAIN; ASCERTAINMENT AND PAYMENT OF DAMAGES****SECTION 301.**

Before the department shall undertake the construction, reconstruction, or improvement of any State highway, wherein a change of width or of existing lines and location is necessary, and damage is likely to result to abutting property, it shall notify the county commissioners of the proper county in writing of the contemplated change in such existing width, lines, and location. After the county commissioners have agreed to such changes or refused to agree thereto, as hereinafter provided, the department may proceed with the work of construction, reconstruction, and improvement.

**SECTION 302.**

After the receipt of the notice as above provided, the county commissioners, if they approve such change of width or of existing lines and location, and agree thereto in writing, shall, when possible, enter into an agreement with the owner or owners of said property as to amount of damage to be paid to said owner or owners. Whenever the amount so agreed upon shall exceed the sum of three hundred dollars (\$300.00) the same shall not be paid by the county until the proposed agreement shall have been filed by the county commissioners in the office of the prothonotary of the county in which the property damaged is situated. If no exceptions are filed thereto within ten (10) days after notice

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given by publication as hereinafter provided, the county commissioners may pay the amount so agreed upon. If exceptions thereto are filed within ten (10) days after such notice, the proceedings shall be presented to the court of quarter sessions for its approval. The court shall fix a time for hearing the matter, at which time the parties to such agreement and any taxpayer interested therein and their witnesses shall be heard, and the court shall either approve or disapprove the agreement as it deems proper. If the court disapproves the agreement, it shall indicate a sum which it would approve for such case if the county commissioners and the property owner could agree thereon. In such cases, if the property owner and the county commissioners agree on the amount of damages indicated by the court as acceptable to it, such agreement may be entered into and shall be final and binding on the parties without any further approval by the court. Notice of the filing of such agreement in the office of the prothonotary and of the time and place of hearing in all such cases shall be given by one publication in one or more newspapers of general circulation throughout the county, which shall state that any taxpayer may file exceptions to the agreement, or may appear at such hearing and be heard, together with his witnesses, as the case may be.

**SECTION 303.**

In case an agreement satisfactory to the county commissioners and said owner or owners cannot be made and the approval of the court thereto secured, the owner or owners of said property damaged thereby or the commissioners of the proper county may present their petition to the court of quarter sessions for the appoint-



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ment of viewers to ascertain and assess such damages, as well as any benefits. Such petitions shall be presented within six (6) years from the date of the approval by the Governor of the plan making the change, but not thereafter.

In assessing the damages, the viewers shall take into consideration the advantages derived from such road passing through the land of the complainant. The viewers shall make report in writing to the court of quarter sessions within the time fixed by the court in its decree appointing the viewers, or such extension thereof as the court may allow. At the end of thirty (30) days after the filing of the report, if no exceptions thereto have been filed, the report shall be confirmed absolute by the court, without waiting until the next term of court. If all parties in interest waive the thirty (30) day period before confirmation absolute, and shall in writing agree to have the report of the viewers confirmed absolute at any time before the expiration of the thirty (30) day period, the court may enter confirmation absolute accordingly. The county commissioners, or any other party to such proceedings, may within thirty (30) days after the filing of the report of the viewers, appeal from the award of the viewers to the court of common pleas, and shall be entitled to a trial by jury. From the judgment of the court of common pleas, an appeal may be had to the Supreme Court as in other cases. Such damages, when ascertained, shall be paid by the county in which the State highway is located.

Whenever the county commissioners do not consent to or approve any such change of width or of existing lines and location, and the secretary determines

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such change to be necessary, he shall, when possible, enter into an agreement with the owner or owners of said property as to the amount of damages to be paid therefor, and if agreed upon, such damages shall be paid by the Commonwealth out of moneys in the Motor License Fund. If such agreement cannot be made, the owner or owners of said property damaged thereby or the Commonwealth may present their or its petition to the court of quarter sessions for the appointment of viewers to ascertain and assess such damage, as well as any benefits, within the same time in the same manner and with the same right of appeal to the owner or owners and to the Commonwealth as is hereinbefore provided in cases where the county agreed to such change. The damages, when ascertained, shall be paid by the Commonwealth out of moneys in the Motor License Fund.

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